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Washington State
Court of Appeals
Division Two

January 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GREGORIO GARZA and LIZBETH GARZA, husband and wife and their marital community composed thereof, Respondents, v. GALAXY THEATRES, LLC, Located at 4649 Point Fosdick Drive Northwest, Gig Harbor, WA 98335, a California limited liability company doing business in the State of Washington, Appellant.	No. 49138-9-II Consolidated with 49518-0-II UNPUBLISHED OPINION

JOHANSON, J. — Gregorio and Lizbeth Garza obtained a default judgment in their negligence action against Galaxy Theatres LLC (Galaxy). Galaxy then moved to vacate the damages award and when that motion was unsuccessful, moved to vacate the default judgment under CR 60(b)(9) or (11). Galaxy appeals the denial of its motion to vacate. It argues that the superior court abused its discretion because Galaxy was not judicially estopped from requesting that the default judgment be vacated and because the Garzas failed to set forth any facts to support an essential element of their claim. Because the superior court did not abuse its discretion when it denied Galaxy's motion to vacate the default judgment, we affirm.

FACTS

I. COMPLAINT AND DEFAULT JUDGMENT

In December 2014, the Garzas sued Galaxy for negligence. The Garzas' complaint alleged that Galaxy "is a California limited liability company doing business . . . as Galaxy Theatres at 4649 Point Fosdick Drive Northwest, and is the location where the subject incident occurred." Clerk's Papers (CP) at 2. The complaint set forth that in February 2012, the Garzas were at "Galaxy Uptown Movie Theatres" to see a movie and that Gregorio[1] stepped in a "'hole'" in the dark theater and was injured. CP at 2. The Garzas reported the incident to the manager on duty, who thanked the Garzas for bringing the hazard to her attention. The Garzas alleged that Galaxy "owed a duty to [them] to make safe or warn against all potentially dangerous conditions and to maintain the theatre in a reasonably safe condition." CP at 3. The Garzas served Galaxy's registered agent with the summons and complaint and mailed courtesy copies to Galaxy's insurance claims administrator, Gallagher Bassett Services, Inc.

Approximately one month after filing the complaint, the Garzas obtained an order of default under CR 55(a). They then requested that the superior court "find [Galaxy] liable . . . and enter judgment." CP at 228. In support of this request, the Garzas submitted materials including an e-mail exchange between Gregorio and the "General Manager" of "Galaxy Uptown." CP at 302. The general manager's e-mail address was "[her name]@galaxytheatres.com." CP at 302. In the exchange, Gregorio referenced that the general manager had "mentioned that someone with your [the general manager's] corporate office would be" in contact with him, and the manager

[1] We use the Garzas' first names for clarity when necessary.

replied by asking Gregorio to submit his medical bills to her. CP at 302. The Garzas also submitted their own declarations, in which they stated they were at "Galaxy Theatres" when Gregorio was injured. CP at 270, 276. The Garzas provided documentation of their damages, including the cost of surgical treatment for Gregorio's injury, Gregorio's lost wages, and general damages for both Garzas.

In March 2015, the superior court entered judgment against Galaxy. When the superior court entered judgment, it found that Galaxy was liable and set the amount of the damage award.

After a year passed, the Garzas mailed the judgment to Galaxy and demanded payment.

II. DENIAL OF MOTION TO VACATE DAMAGES

In May 2016, Galaxy filed a motion to vacate the damages award under CR 60(b)(1) and (11). The Garzas opposed Galaxy's motion to vacate damages and argued that Galaxy's motion under CR 60(b)(1) was time-barred and that CR 60(b)(11) did not allow relief because Galaxy had not shown an extraordinary circumstance. In its reply memorandum, Galaxy stated that it "recognizes the time limitations under the Civil Rules, and for that reason has conceded liability under the circumstances." CP at 482.

In June, the superior court heard argument on whether it should vacate the damages award. At that hearing, Galaxy stated, "[W]e understand the time limits and the rules, and Galaxy has conceded, made a heavy concession that we're not asking to have the entire judgment vacated. . . . [W]e're not seeking to have the order vacated on liability and damages. We're just talking about

damages." Report of Proceedings (RP) (June 3, 2016) at 13. The superior court denied the motion to vacate damages.[2]

III. DENIAL OF MOTION TO VACATE THE DEFAULT JUDGMENT

In August, Galaxy filed a motion to vacate the default judgment under CR 60(b)(9) and (11). Galaxy now argued that the *entire* judgment should be vacated because the Garzas "failed to present sufficient factual evidence to support the legal conclusion that Galaxy owed the Garzas a duty" or because of unavoidable casualty or misfortune—the failure of the registered agent's e-mail system. CP at 548.

The Garzas opposed Galaxy's motion to vacate the entire judgment and argued that Galaxy's CR 60(b)(9) and (11) arguments were precluded by its admission that it was liable at the June hearing and by judicial estoppel. The Garzas alternatively argued that they had submitted sufficient evidence to support the existence of a duty.

The superior court denied the motion to vacate the entire judgment. In its oral ruling, the superior court accepted Galaxy's argument that the court looked only to the facts at the time the default judgment was entered. The superior court ruled that "there were sufficient facts at the time of the hearing" on the entry of judgment to establish that Galaxy was "properly before" the superior court.[3] RP (Sept. 30, 2016) at 29.

[2] Galaxy appealed both the order denying the motion to vacate damages and the subsequent order denying Galaxy's motion to vacate the entire judgment. We consolidated the appeals. On appeal, Galaxy advances no argument challenging the superior court's denial of Galaxy's May 2016 motion to vacate the damages award.

[3] The superior court alternatively grounded its decision upon the application of judicial estoppel.

ANALYSIS

I. CR 60

We review for an abuse of discretion the decision not to vacate a default judgment under CR 60(b). *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 199, 165 P.3d 1271 (2007). In determining whether to deny a motion to vacate a default judgment, "'[t]he trial court must balance the requirement that each party follow procedural rules with a party's interest in a trial on the merits.'" *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 403, 196 P.3d 711 (2008) (alteration in original) (quoting *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004)).

CR 60(b) provides for relief from a judgment under certain circumstances:

> On motion and upon such terms as are just, the court may relieve a party or the party's 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;
>
> . . . .
>
> (9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;
>
> . . . .
>
> (11) Any other reason justifying relief from the operation of the judgment.
>
> 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.

II. DENIAL OF GALAXY'S MOTION UNDER CR 60(b)(9)

Galaxy argues that the superior court abused its discretion when it denied Galaxy's motion under CR 60(b)(9) because the failure of the registered agent's e-mail server constituted "unavoidable casualty or misfortune" that prevented Galaxy from defending. Br. of Appellant at 32. We disagree.

Relief under CR 60(b)(9) is justified if "events beyond a party's control—such as a serious illness, accident, natural disaster, or similar event—prevent[] the party from taking actions to pursue or defend the case." *Stanley v. Cole*, 157 Wn. App. 873, 882, 239 P.3d 611 (2010). In *Stanley*, Division One of this court explained that relief is not merited for "'something other than an accident or disease or natural catastrophe preventing the appearance of a party or his witness.'" 157 Wn. App. at 882 (quoting *State v. Scott*, 20 Wn. App. 382, 386 n.1, 580 P.2d 1099 (1978), *aff'd*, 92 Wn.2d 209, 595 P.2d 549 (1979)). An unavoidable casualty is one "that cannot be avoided because it is produced by an irresistible physical cause that cannot be prevented by human skill or reasonable foresight." BLACK'S LAW DICTIONARY 18, 1756 (10th ed. 2014); *see also Stanley*, 157 Wn. App. at 882 n.14 (relying on the same definition).

In support of its motion to vacate, Galaxy submitted evidence that the registered agent had e-mailed the summons and complaint to Pamela Bush, Galaxy's "corporate contact," but that the registered agent's e-mail server had failed, preventing Bush from receiving the documents. But failure of an e-mail server is not an occurrence that is unavoidable "because it is produced by an irresistible physical cause that cannot be prevented by human skill or reasonable foresight." *See* BLACK'S 18, 1756. Nor can it reasonably be characterized as an accident, a disease, or a natural catastrophe that prevented Galaxy's appearance. *See Stanley*, 157 Wn. App. at 882.

Rather the e-mail server failure is the type of foreseeable, avoidable breakdown in office communications that may—or may not—constitute "excusable" neglect under CR 60(b)(1). *See Rosander*, 147 Wn. App. at 407. Indeed, the superior court came to precisely this conclusion at the hearing on Galaxy's motion to vacate damages, stating that it did not think that the e-mail server's failure was the type of neglect that was "excusable" under CR 60(b)(1).

We conclude that CR 60(b)(9) is inapplicable here. Thus, we affirm the superior court's denial of Galaxy's motion brought under CR 60(b)(9).

III. DENIAL OF GALAXY'S MOTION UNDER CR 60(b)(11)

Galaxy argues that the superior court should have granted Galaxy's motion to vacate the judgment under CR 60(b)(11), a catch-all provision authorizing a trial court to vacate a judgment if there is "[a]ny other reason justifying relief from the operation of the judgment." Galaxy contends that the superior court's rationale for denying Galaxy's motion—that the Garzas had introduced sufficient facts to establish duty—was untenable. Again, we disagree.[4]

"[T]he party seeking a default judgment [must] set forth facts supporting, at a minimum, each element of the claim." *Friebe v. Supancheck*, 98 Wn. App. 260, 268, 992 P.2d 1014 (1999). The unchallenged facts must be sufficient to constitute a legitimate cause of action. *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 326, 242 P.3d 27 (2010).

A defaulting defendant admits the factual allegations in the complaint. *Kaye*, 158 Wn. App. at 326. We also look to the "materials . . . submitted in support of" the plaintiff's request for default judgment to determine whether the plaintiff had provided a factual basis to support an

[4] Because we hold that the superior court properly denied Galaxy's motion under CR 60(b)(11) on the basis that the Garzas had presented sufficient facts to establish duty, we do not address Galaxy's other arguments that the superior court abused its discretion. We also do not address the Garzas' claim that Galaxy's motion was precluded by judicial estoppel.

essential element of her claim. *Caouette v. Martinez,* 71 Wn. App. 69, 78, 856 P.2d 725 (1993). Mere unsupported legal conclusions—such as an allegation that a truck was "negligently entrusted" to another—are insufficient to support a default judgment. *Caouette*, 71 Wn. App. at 78-79.

"[P]rior to entering a default judgment, the trial court must assess . . . the sufficiency of the complaint." *Kaye*, 158 Wn. App. at 330. This is so because a default judgment that would inevitably be vacated if challenged should not be entered. *Kaye*, 158 Wn. App. at 330.

To establish breach of duty in premises liability cases, the party alleged to owe a duty must have "actually possessed the premises" "because the common law duty of care existing in premises liability law is incumbent on the *possessor* of land." *Coleman v. Hoffman*, 115 Wn. App. 853, 859, 64 P.3d 65 (2003). "'A possessor of land is (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).'" *Coleman*, 115 Wn. App. at 860 (quoting *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 655, 869 P.2d 1014 (1994)).

Under these rules, Galaxy was entitled to vacation of the default judgment only if the Garzas failed to set forth facts that could show that Galaxy occupied the premises with intent to control. *See Coleman*, 115 Wn. App. at 860; *Kaye*, 158 Wn. App. at 326. In their complaint, the Garzas alleged that "Galaxy Theatres, LLC" was a company "doing business . . . as Galaxy Theatres at 4649 Point Fosdick Drive Northwest, and is the location where the subject incident

occurred."[5] CP at 2. This factual allegation that Galaxy did business at and was the location where the incident occurred is taken as true. *Kaye*, 158 Wn. App. at 326. It is sufficient to establish that Galaxy possessed the location, and we reject Galaxy's arguments to the contrary.

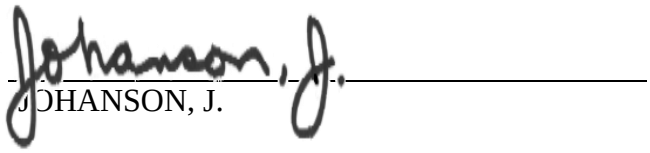
Additionally, the Garzas submitted their own declarations that they were at "Galaxy Theatres" when the incident occurred and an e-mail exchange occurred between the general manager of the theater, whose e-mail address was "[her name]@galaxytheatres.com." CP at 270, 276, 302. In his e-mail to the general manager, Gregorio stated, "I am emailing you because when [y]ou and [I] talked the day after my injury at your theatre you mentioned that someone with your corporate office would be contacting me to let me know where I can send my medical bills from the injury." CP at 302.

Taken collectively, the Garzas' evidence at the time the default judgment was entered constituted a sufficient factual basis to support their allegation that Galaxy possessed the premises. Accordingly, the superior court did not abuse its discretion when it ruled that there were "sufficient facts" that Galaxy owed a duty to the Garzas and denied Galaxy's motion to vacate the default judgment under CR 60(b)(11).

[5] The Garzas also alleged in their complaint that Galaxy owed a duty to the Garzas. But this allegation is a legal conclusion, not a factual basis to support that Galaxy in fact owed such a duty. *See Caouette*, 71 Wn. App. at 78-79.

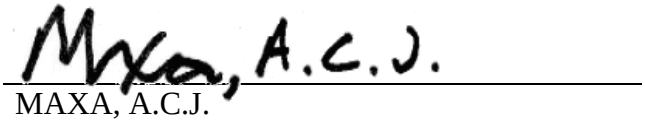
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



JOHANSON, J.

We concur:



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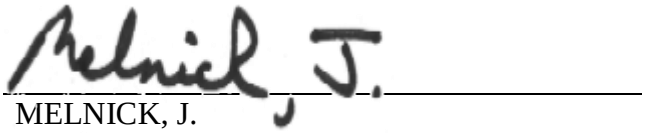

MELNICK, J.