IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEVE and DOROTHY FREITAS, a married couple, Appellants, v. FARMERS INSURANCE COMPANY, and THE CURE WATER DAMAGE, INC., d/b/a THE CURE WATER DAMAGE, d/b/a THE CURE, Respondents.	No. 40142-8-II UNPUBLISHED OPINION

Worswick, J. — Steven and Dorothy Freitas seek review of a trial court's order vacating the default judgment they obtained against a water damage restoration contractor whose alleged negligent workmanship and breach of contract resulted in damage to the Freitases' home. We affirm.

Facts

On September 25, 2002, the Freitases discovered water leak damage in their home resulting from a burst pipe. They immediately contacted their insurer, Farmers Insurance Company, who "put [them] in contact with" an approved water damage remediation contractor, The Cure Water Damage, Inc. (CWD). Clerk's Papers at 193. Dorothy Freitas signed a contract with CWD on September 25 for water infiltration abatement services. Over the next two days, CWD performed the abatement services while the Freitas family was out of the home. Farmers inspected the completed cleanup on September 27, 2002.

Nearly six years later, in August 2008, Steven Freitas began a remodeling project in the area of his home where CWD had performed remediation services. He discovered mold behind the walls, caused by moisture leaking from a sewer line that had been punctured during the CWD cleanup. The mold purportedly caused the Freitas family to experience various health problems and rendered the Freitas home uninhabitable.

On September 24, 2008, the Freitases filed a summons and complaint against their insurer and the abatement contractor, seeking damages and declaratory relief. The pleadings named as defendants "Farmers Insurance Company" and "The Cure Water Damage, Inc., d/b/a The Cure Water Damage, d/b/a The Cure." CP at 217 (capitalization omitted). Farmers was served with the summons and complaint at its Mercer Island office on December 23, 2008. That same day, a process server delivered the summons and complaint intended for CWD to Joe DeMarco at his Mercer Street business office in Seattle. DeMarco was president of Cure Disaster Services, Inc. (CDS), a company that purportedly has no connection to the named defendant CWD.

After the process server left DeMarco's office, De Marco read through the legal papers and realized that they appeared to have been delivered to him in error. He immediately attempted to call the plaintiffs' attorney, Jany Jacob, whose name and telephone number appeared on the summons and complaint. But when DeMarco dialed the number, he received a recording indicating that the number was no longer in service. Following an internal investigation that verified no one in his company had ever performed any services at the Freitases' home, DeMarco found Jacob's internet website, obtained her email address therefrom, and sent her an email later that same day (December 23, 2008). DeMarco's email advised, "You must have our company

mixed up with someone else," and explained that his company had never performed any services for the Freitases and that the legal papers had been delivered to him in error. CP at 166. The email explained that DeMarco had tried to telephone Jacob, but her number was not working, and invited Jacob to contact him if she had further questions.[1] When Jacob did not respond to his email and DeMarco heard nothing further from her about the case, he concluded that Jacob had discovered the process service error and was pursuing service of the company named in the summons and complaint.[2]

Some four months later, the Freitases' new attorney, Peter Kesling, moved for an order of default,[3] apparently without giving notice to either the named defendant, CWD, or to CDS, who had actually received the misdirected service.[4] The superior court granted the motion, entering an

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[1] DeMarco's email was configured to automatically send him an "undeliverable" notification if an email message was not delivered to the email address when it was sent. CP at 164. After sending the email to Jacob, DeMarco received no such notification.

[2] DeMarco averred that he heard nothing further about the case and did not expect to since CDS was not a named party and had nothing to do with the events that led to the lawsuit. DeMarco's employment with CDS ended on May 13, 2009.

[3] Jacob, who had filed the suit and ordered service of process, withdrew from the case on February 9, 2009, purportedly indicating to the Freitases' new counsel, Peter Kesling, that she had received "no response" from the defendants. CP at 134. Some two weeks before her withdrawal, on January 23, 2009, Jacob sent Dorothy Freitas an email message indicating that Farmers had appeared, and further (cryptically) stated, "Still no formal submission from The Cure though." CP at 51. It is not clear if Jacob's reference to "formal submission" impliedly acknowledged her receipt of DeMarco's email or simply meant that no notice of appearance had been filed. When Kesling later tried to contact Jacob to clarify whether she had received DeMarco's email, he was unable to locate her.

[4] *See* CR 55(a)(3), which provides that "[a]ny party" who has made an appearance for any purpose shall be served with written notice of a motion for default at least 5 days before the hearing on the motion. The same rule also states, however, that "[a]ny party" who has not appeared before the motion for default is filed is not entitled to a notice of the motion. CR

order of default on April 14, 2009, against the named defendant, CWD.

Seven weeks later, the Freitases filed a motion for default judgment, which the trial court granted on June 1, 2009, imposing a judgment against CWD totaling more than $728,000. In spite of obtaining a judgment against only CWD, Kesling, the Freitases' attorney, mailed a demand letter to CDS's insurer, James River Insurance Co., seeking payment of the default judgment against CWD under CDS's policy of insurance. The James River Insurance Group received the demand on July 14, 2009, and on July 28 sent a responsive letter that acknowledged receipt of the demand, noted that the demand was James River's first notice of the claim, and that James River was investigating the claim. When James River notified its insured, CDS, that it had received the demand letter, CDS immediately retained counsel, Steven Gibbons.

On July 30, 2009, Gibbons sent a letter to Kesling requesting that he cease and desist all collection efforts against CDS on the default judgment against CWD, and explaining that the plaintiffs were pursuing collection against the wrong entity. Gibbons's letter explained that Jacob, the Freitases' original counsel, had been timely notified in writing that service of process had been misdirected to CDS, an entity with no connection to the named defendant CWD, to the plaintiffs, or to the work that allegedly gave rise to the lawsuit.

When Kesling received Gibbons's letter, he telephoned Gibbons and asked for a copy of the written notice to Jacob stating that the service had been misdirected. Gibbons responded on August 13 by mailing a copy of DeMarco's December 23rd email to Jacob. Kesling tried to verify with Jacob whether she had received DeMarco's email, but his multiple attempts to contact her

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55(a)(3).

were fruitless. On September 8, 2009, Kesling sent a letter to Gibbons explaining that he could not verify whether the Freitases' former attorney had received DeMarco's email, and in any event Gibbons's client never filed a notice of appearance with the court after it received the summons and complaint. The letter invited Gibbons to provide independent verification that Jacob actually received DeMarco's email or to proceed with filing a motion to set aside the default and default judgment.

On September 10, 2009, after trying several different telephone numbers, Gibbons was able to track down Jacob, who confirmed by telephone that the email address to which DeMarco had sent his December 23, 2008 email was a valid email address for her at that time. Jacob told Gibbons that she had no copies of emails sent to that address in December 2008, that such emails would have been deleted automatically for law firm security purposes, and that in December 2008 she was wrapping up her practice because of health matters.

After obtaining an affidavit from DeMarco, who was no longer employed by CDS, Gibbons on behalf of CDS filed a motion on October 23, 2009, for an order to show cause why

the Freitases should not be ordered to cease and desist from attempting to collect the default judgment from CDS and/or to vacate the default judgment.[5] On November 2, 2009, the superior court granted the motion setting the show cause hearing for November 23, 2009. The parties filed briefs, declarations, and other exhibits for the show cause hearing. The Freitases filed a declaration by Dorothy Freitas claiming that CDS and CWD are in fact the same entity. Lisa Bongi, president, principal, and officer of CDS, filed a responding declaration, refuting Dorothy Freitas's claims.

Following vigorous argument at the November 23 hearing, the superior court entered an order directing the Freitases to cease and desist attempts to collect from CDS on the June 1, 2009 default judgment entered against CWD. The court also set aside the April 14, 2009 order of default and vacated the June 1, 2009 default judgment "for failure to serve process on the defendant The Cure Water Damage, Inc." CP at 8. The trial court denied CDS's request for attorney fees.[6] The Freitases appeal.

[5] CDS filed the motion as a non-party through the special appearance of its counsel.

[6] The tape recording of the show cause hearing purportedly is not available due to mechanical failure. We cannot verify or address any "findings" beyond those contained in the order vacating the default judgment given the absence of a transcript, or a narrative or agreed report of proceedings available under RAP 9.3 and 9.4. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (appellate court's review on direct appeal is limited to the trial records identified on appeal).

Discussion

The Freitases contend that the trial court erred in setting aside the default judgment. We disagree.[7]

Standard of Review

We review a trial court's ruling on a motion to vacate a default judgment for an abuse of discretion. *Little v. King*, 160 Wn.2d 696, 702-03, 161 P.3d 345 (2007); *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004); *In re Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds, or exercised for untenable reasons. *Mayer v. Sto Indus., Inc*., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).[8] Put another way, we acknowledge that the trial court's exercise of discretion may result in a decision upon which reasonable minds can differ.

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[7] CDS moved for vacation of the default judgment arguing alternatively that the vacation was warranted under case law interpreting CR 55(a)(3) and CR 60(b)(1). As noted, the trial court set aside the default judgment because the named defendant, CWD, was not served and the Freitases were improperly attempting to collect the judgment from CDS, who was not a named party. On appeal, the Freitases argue that vacation is not warranted under either of the noted court rules. We address the CR 60 issue first; and because our disposition of that issue resolves this case, we do not reach the Freitases' argument that there is no basis for vacating the default judgment under CR 55(a)(3). *See Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 165, 795 P.2d 1143 (1990) (a reviewing court is not obliged to decide all the issues raised by the parties, but only those which are determinative).

[8] Our Supreme Court has explained:

> A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'"

Mayer, 156 Wn.2d at 684 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

Consequently, if the trial court's discretionary judgment "'is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld.'" *Stevens*, 94 Wn. App. at 30 (quoting *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990)).

Analysis

Generally, default judgments are not favored in Washington, based on an overriding policy that prefers parties to resolve their disputes on the merits. *Little*, 160 Wn.2d at 703; *Griggs v. Averbeck Realty*, *Inc*., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979); *Showalter*, 124 Wn. App. at 510. Our primary concern is that a trial court's decision on a motion to vacate a default judgment is just and equitable. *Little*, 160 Wn.2d at 703; *Griggs*, 92 Wn.2d at 581-82; *Showalter*, 124 Wn. App. at 510. Accordingly, the requirement that each party follow procedural rules must be balanced with a party's interest in a trial on the merits. *Little*, 160 Wn.2d at 703; *Griggs*, 92 Wn.2d at 582; *Showalter*, 124 Wn. App. at 510-11. We assess the trial court's decision in light of the particular facts and circumstances of the case at hand; and we are less likely to reverse a trial court decision that sets aside a default judgment than a decision that does not. *Showalter*, 124 Wn. App. at 511; *Griggs*, 92 Wn.2d at 582; *White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968).

In deciding a motion to vacate a default judgment under CR 60(b),[9] the trial court addresses two primary and two secondary factors, which the moving party must show: (1) that there is substantial evidence to support, at least prima facie, a defense to the claim asserted by the

[9] The rule provides in relevant part that a court may relieve a party from final judgment for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." CR 60(b)(1). The motion for relief of judgment must be made within one year after the judgment if based on the reasons stated in CR 60(b)(1). CR 60(b).

opposing party; (2) that the moving party's failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the moving party acted with due diligence after notice of the default judgment; and (4) that the opposing party will not suffer substantial hardship if the default judgment is vacated. *Little*, 160 Wn.2d at 703-04 (citing *White*, 73 Wn.2d at 352); *Showalter*, 124 Wn. App. at 511; *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003). The primary purpose in establishing the first factor is to avoid a useless subsequent trial. *Johnson*, 116 Wn. App. at 841; *Griggs*, 92 Wn.2d at 583.

The trial court examines the evidence and reasonable inferences in the light most favorable to the moving party to determine whether there is substantial evidence of a prima facie defense. *Pfaff v. State Farm Mut. Auto. Ins. Co*., 103 Wn. App. 829, 834, 14 P.3d 837 (2000). Moreover, " [i]f a 'strong or virtually conclusive defense' is demonstrated, the court will spend little time inquiring into the reasons for the failure to appear and answer, provided the moving party timely moved to vacate and the failure to appear was not willful." *Johnson*, 116 Wn. App. at 841 (quoting *White*, 73 Wn.2d at 352). But when the moving party's evidence supports no more than a prima facie defense, the reasons for the failure to timely appear will be scrutinized with greater care. *Johnson*, 116 Wn. App. at 842; *White*, 73 Wn.2d at 352-53.

Regarding the first *White* factor (substantial evidence of defense), the Freitases contend that CDS failed to present substantial evidence that the wrong entity was sued. They contend that Dorothy Freitas's declaration provides substantial evidence that CDS and CWD are in fact the same entity. Dorothy Freitas's declaration in opposition to CDS's motion to vacate the default judgment states in relevant part that her insurer directed her to contact an approved contractor,

that she conducted an internet search for such contractor, that she found the website presently operated by CDS, and that she called the telephone number listed on that website.[10] She stated that the company representative at the Seattle office who answered her call[11] told her that "they had a technician in Shelton" who could be at the Freitas residence in one-half hour. CP at 45. Dorothy Freitas stated that a person named "Mark" arrived at her home, Mark identified himself as a trained technician with The Cure Water Damage, and that Mark's uniform and van displayed the same emblem appearing on the CDS website. CP at 45.

The Freitases' argument, however, ignores Lisa Bongi's responding declaration. Bongi declared that she has been the president of CDS since May 2009 and has been a principal and an officer since the company's formation in January 2002. Bongi says that to her knowledge CDS has never been on any insurer's approved list, that CDS did not have a website until November 2002, and that the website did not list CDS's telephone number until December 2004; thus, the telephone number that Dorothy Freitas purportedly found on a website in September 2002 could not have belonged to CDS. Bongi also stated that CDS has never employed anyone named Mark, nor has it ever had any employee in Shelton, nor does CDS serve that area. Bongi further stated that CDS technicians do not wear uniforms or display marks or logos on clothing or vans.

Bongi's declaration further states that the contract Dorothy Freitas signed on September 25, 2002, with a company called Cure Water Damage, listing a company address in Shelton and a telephone number, has no relation to CDS, as CDS has never had an office in Shelton, and has

[10] These assertions are in marked contrast to Dorothy Freitas's prior declaration, which stated that her insurer "put [her] in contact with The Cure Water Damage, Inc." CP at 193.

[11] Dorothy Freitas maintains that CWD and CDS are the same entity.

never used the telephone number displayed on the contract. Bongi states that the company the Freitases contracted with appears to be a sole proprietorship of Mark Breitbach, that such company is registered as "A AAA Cure Water Damage," and that such company has a different unified business identifier[12] number than CDS. CP at 27-28.

A trial court "must take the evidence and reasonable inferences in the light most favorable to the CR 60 movant" when deciding whether the movant has presented substantial evidence of a prima facie defense. *Pfaff*, 103 Wn. App. at 834. In *Pfaff*, the movant, based on the strength of its affidavit, had presented as a matter of law substantial evidence to support a prima facie defense to the claim asserted. *Pfaff*, 103 Wn. App. at 833, 835. The same is true here. Bongi's declaration sets forth facts sufficient to support a finding that the company the Freitases contracted with was not CDS. "[I]f the CR 60 movant can produce substantial evidence [supporting at least a prima facie defense], each party should be permitted (assuming *White's* other factors are met) to present his or her case to a trier of fact at a properly convened trial." *Pfaff*, 103 Wn. App. at 834-35. We hold that CDS presented substantial evidence of at least a prima facie defense to the Freitases' asserted claims.

The Freitases next argue that the facts of this case show neither excusable neglect nor due diligence (*White* factors 2 and 3) on the part of movant, CDS, but that is not so. As noted, as soon as DeMarco realized that the legal papers left with him concerned a similarly named, but different company, he attempted to contact Jacob, the Freitases' attorney listed on the pleadings, at the telephone number listed thereon, but discovered that the number was not a working

[12] "'Unified business identifier (UBI)' means a nine-digit number used to identify a business registered or licensed with one or more state agencies." WAC 308-320-030(14).

number. That same day he found Jacob's website and emailed her, informing her about the process service mistake, explaining that his company had never done any work for the Freitases, stating that "[y]ou must have our company mixed up with someone else," and inviting Jacob to contact him if she had any questions. CP at 166. When DeMarco received no response, he assumed that Jacob had realized the service mistake and was instead pursuing someone other than CDS in the Freitases' lawsuit. This was reasonable under the circumstances and sufficiently excuses CDS's failure to further respond (i.e. formally appear and answer) since CDS was not a named defendant in the Freitases' lawsuit.

The Freitases' contention that CDS did not act diligently after learning about the default judgment (*White* factor 3) also fails. As noted, the default judgment was entered *against CWD* on June l, 2009. CDS learned of that event only when the Freitases sent a demand letter to CDS's insurer that sought to collect on the Freitases' default judgment against CWD, and the insurer then asked CDS about the matter. When CDS, through its attorney, was unable to resolve the matter with the Freitases, CDS filed a motion on October 23, 2009, seeking a show cause hearing for an order to cease and desist collection efforts against CDS and/or vacate the default judgment. Because CDS filed that motion less than one year after entry of the default judgment, it was timely. *See* CR 60(b); *White*, 73 Wn.2d at 352. Also there is no evidence that CDS's failure to appear in the first instance was "willful." *White*, 73 Wn.2d at 352. As noted, the record shows diligence from the point (July 2009) when CDS discovered, from its insurer, that a default judgment had been entered. CDS immediately retained counsel, Gibbons, who tried to resolve the matter in a series of letters and telephone calls with the Freitases' new counsel, Kesling. When

those efforts proved fruitless, Gibbons secured a declaration from DeMarco and filed the noted motion seeking relief. Under the circumstances of this case, CDS acted with sufficient diligence after learning about the June 2009 default judgment.

As for the final *White* factor, prejudice to the judgment creditor, the Freitases contend that they will sustain substantial hardship if the default judgment is set aside. They argue that the black mold infestation has rendered their home uninhabitable, and they seek compensation for the expenses they have suffered resulting from that circumstance. But all of the Freitases' asserted harms can be addressed by an award of damages against the party at fault, provided they prevail at trial. The Freitases identify no hardship other than the commensurate burdens of proving one's case at trial. Merely proceeding to trial for a decision on the merits does not qualify as a "substantial hardship" under *White's* fourth factor. *See Pfaff*, 103 Wn. App. at 836 ("the prospect of trial cannot constitute, without more, 'substantial hardship' within the meaning of *White's* fourth factor"); *Johnson*, 116 Wn. App. at 842 ("vacation of a default judgment inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits").

Nevertheless, the Freitases contend that the equities weigh in their favor. They contend that "[t]he defendant[']s recalcitrance is disgusting when considering that a family of four has been evicted from their home as a result of the defendant's conduct." Br. of Appellant at 14. But, as noted, CDS provided substantial evidence that CDS is not the defendant in question because it had no connection with the work performed at the Freitases' house that allegedly caused the mold infestation, nor is CDS named as a defendant in the lawsuit. Accordingly, this

lawsuit should be properly resolved on the merits in further proceedings. *See Pfaff*, 103 Wn. App. at 834-35.

In sum, under the circumstances of this case, we cannot say that the trial court abused its discretion in vacating the default judgment.[13]

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 pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Hunt, J.

Penoyar, C.J.

[13] As noted, our disposition of the CR 60 issue resolves this case. Accordingly, we do not reach the Freitases' alternative argument that there is no basis for vacating the default judgment under CR 55(a)(3) because DeMarco's email did not qualify as an informal appearance thereby entitling CDS to notice of the default hearing.