IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

OB-1, L.L.C., a limited liability company,	)	**No. 29077-8-III**
Appellant,	)	**Division Three**
v.	)	
JONATHAN PINSON, an individual, and STAN VINSON, an individual,	)	**UNPUBLISHED OPINION**
Respondents.	)	

Siddoway, J. — OB-1, LLC appeals the trial court's order vacating a default judgment it obtained against Jonathan Pinson and Stan Vinson. OB-1 has never contested the individuals' demonstration that they have prima facie defenses against OB-1's claims. It has not demonstrated to us that the trial court abused its discretion when it concluded that Mr. Pinson and Mr. Vinson failed to respond to OB-1's complaint as a result of confusion over a court order that they believed prohibited collection action against them individually, and which was relevant, but not disclosed, when OB-1 secured the default. We affirm the order vacating the default judgment and remand for

proceedings on the merits.

FACTS AND PROCEDURAL BACKGROUND

This case is related to a lawsuit that Cascades Food Group Inc. commenced in Grant County in April 2004 against Basin Frozen Foods Inc., OB-1's predecessor, and others (Cascades' 2004 lawsuit). Cascades alleged breach of a lease, tortious interference, and other claims. In February 2005, the defendants named in Cascades' 2004 lawsuit filed an answer, counterclaim, and a third party complaint by OB-1 against Mr. Pinson and Mr. Vinson, principals of Cascades. The third party complaint sought to recover from the two men individually for contractual obligations they had incurred on behalf of Cascades prior to the date of its incorporation.

A little over a month later, the same defendants filed an amended answer adding a claim to OB-1's third party complaint, seeking to pierce the corporate veil and hold Mr. Pinson and Mr. Vinson personally liable for Cascades' debts. When this further amendment was resisted on grounds it would delay trial, OB-1 filed a declaration from its lawyer explaining that the complaint would not raise new matters requiring additional discovery; its purpose was simply to seek an alternative avenue of collection for amounts allegedly owed to OB-1 by Cascades. The court denied the motion to further amend, in response to which OB-1 decided to voluntarily dismiss its existing third party claim. OB-1's lawyer prepared a stipulation dismissing the third party complaint, which Cascades'

lawyer signed on July 19, 2005.

By September 2006, Basin, OB-1, and the other defendants had obtained summary judgment on their counterclaim against Cascades, including an award of $268,618.55 in damages. But the court's order entered on September 7, 2006 prohibited enforcement, as follows:

> Although the Defendants are awarded judgment in the above amount, the Defendants shall not take steps to enforce that judgment until final resolution of this matter. [Cascades] may be entitled to damages should this proceed and [Cascades] may be able to apply damages, if any, awarded to reduce the amount awarded to the Defendants under paragraph 1 above.

Clerk's Papers (CP) at 83.

Seventeen months after execution of the stipulation and order dismissing the third party complaint, on December 13, 2006, OB-1's lawyer presented them for entry, ex parte. A week later, OB-1 commenced this litigation. The complaint sought the same contract damages from Mr. Pinson and Mr. Vinson as had been awarded on OB-1's counterclaim in Cascades' 2004 lawsuit. Although the complaint alleged that the contract damages requested were in a liquidated amount of $268,618.55, it did not disclose that it was relying on an earlier-entered summary judgment award in that amount, or that enforcement of its award had been explicitly prohibited by court order pending the outcome of Cascades' claims. Cascades' claims had still not been resolved.

OB-1 caused Mr. Pinson and Mr. Vinson to be served with the summons and

complaint on January 18, 2007. When neither appeared or responded, OB-1 initially took no action. Almost nine months later it moved for default judgment, presenting and obtaining an order of default and judgment on October 8, 2007. It did not give notice of the motion to Mr. Pinson, Mr. Vinson, or anyone on their behalf. With prejudgment interest on the liquidated amount established by a supporting affidavit, the judgment was in the amount of $373,735.28.

Mr. Pinson and Mr. Vinson did not learn of the default judgment until more than a year and a half later, when OB-1 first took steps to collect it. On June 10, 2009, they moved to vacate the judgment, asserting that they had learned of it only a few weeks before. They supported their motion with their declarations stating that while they had briefly scanned the complaint each received in January 2007, they had not believed the complaints required a response because the Grant County trial court had ordered OB-1 not to take steps to collect the award until Cascades' claims against OB-1 and the other defendants were resolved. Both stated that they mistakenly assumed the papers were related to Cascades' 2004 lawsuit.

In moving to set aside the order of default, Mr. Pinson and Mr. Vinson relied on CR 55(c) and, to set aside the judgment, on CR 60(b)(4), (6), and (11). They accused OB-1 of misconduct by pursuing an action that violated the letter and spirit of the September 2006 order and failing to disclose, in presenting the order and judgment, that the

liquidated liability had been explicitly suspended by that court order. They demonstrated several prima facie defenses to liability: (1) case law holding that promoters do not have pre-incorporation liability for contractual obligations undertaken on behalf of a corporation if the contra-party knows of the nonexistence of the corporation and agrees to look solely to the corporation for payment; (2) that while
OB-1's basis for seeking to pierce the corporate veil was Cascades' inability to pay its debts, the trial court in Cascades' 2004 lawsuit had previously recognized that Cascades' unpaid contract liabilities might be exceeded by damages it was entitled to recover from the defendants, making deferral and offset appropriate; and (3) evidence and argument that any amounts owed by Cascades to OB-1 were subject to additional offsets and payments to third parties on Basin's and OB-1's behalf, separate and apart from its pending legal claims. OB-1 has never contested the sufficiency of this showing.

OB-1 did argue in reply that the motion to vacate the default judgment was time-barred, having been brought more than a year after entry and beyond a "reasonable time" as required by CR 60(b). It vigorously defended itself against the charge of misconduct, pointing out that the stipulation dismissing the third party complaint was signed by counsel for the parties prior to entry of the September 2006 order, and the September order did not include Mr. Pinson or Mr. Vinson in the caption or as participating in presentation of the order; that the summonses and complaint in this action were

straightforward and clear, never purporting to be pleadings in Cascades' 2004 lawsuit; and that it could not fairly be accused of seeking to mislead where it commenced this second action in Grant County, presenting its default judgment to the same judge that had entered the September 2006 order.

The trial court announced its decision to grant the motion to vacate in a letter to counsel on October 8, 2009. Among its reasons were that it would have granted the motion to vacate under the "excusable neglect" grounds provided by CR 60(b)(1) had Cascades moved on that facially time-barred basis. While it recognized that a motion to vacate on 60(b)(1) grounds must be brought within a year, the court said, "I am unable to interpret OB-1's actions after obtaining default judgment as other than an attempt to prevent vacation of that judgment by withholding enforcement until the time for moving to vacate had passed," and, "Under these limited circumstances, I believe the doctrine of waiver [of the time bar], as enunciated by our Supreme Court in *Lybbert v. Grant County*, 141 W[n].2d 29, 1 P.3d 1124 (2000) applies." CP at 180.

Alternatively, the trial court found that CR 60(b)(4) misconduct was grounds for vacating the judgment where OB-1 failed, when applying ex parte for default judgment, to call to the attention of the judge Cascades' 2004 lawsuit, and the order prohibiting enforcement of the summary judgment award. It concluded, citing RPC 3.3(f),[1] that OB-

[1] RPC 3.3(f) provides, "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an

1's lawyer had an obligation in applying for default judgment to disclose to the judge all relevant facts known, including Cascades' 2004 lawsuit and potential offsets. While finding the default judgment to have been obtained through misconduct as that term is used in CR 60, the court said, "I do not find this misconduct to be willful or intentional. I suspect it was merely an oversight." CP at 153. Finally, it found that the motion was brought within a reasonable time as required by CR 60(b), where brought within three weeks of becoming aware of the judgment's existence.

OB-1 timely appealed from the order vacating the default judgment, which incorporated the court's letter ruling. CP at 203-04.

ANALYSIS

"'Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits.'" *Topliff v. Chi. Ins. Co.*, 130 Wn. App. 301, 304, 122 P.3d 922 (2005) (quoting *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004) (citing *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979))), *review denied*, 157 Wn.2d 1018 (2006). We review a trial court's ruling under CR 60(b) for an abuse of discretion. *Id.* at 304-05 (citing *Showalter*, 124 Wn. App. at 510). A trial court abuses its discretion when it exercises it on untenable grounds or for manifestly unreasonable reasons. *State ex rel.*

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informed decision, whether or not the facts are adverse."

Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Our primary concern is whether the default judgment is just and equitable; thus, "'we evaluate the trial court's decision by considering the unique facts and circumstances of the case before us.'" *Topliff*, 130 Wn. App. at 305 (quoting *Showalter*, 124 Wn. App. at 511). We are more likely to reverse a court's decision not to set aside a default judgment than a decision to set aside such a judgment. *Id.*

I.

OB-1 argues that a trial court may not vacate a default judgment for fraud or misconduct under CR 60(b)(4) absent a showing that the party obtaining the judgment made statements or misrepresentations that prevented the party against whom the default is taken from fully and fairly presenting its case, relying on *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056, *review denied*, 113 Wn.2d 1029 (1989).

In *Hickey*, the defendant acquired a lien against her ex-husband's property as part of the property distribution in their dissolution proceeding. When a bank holding a mortgage against the same property for a debt on which Mr. Hickey defaulted filed a complaint for foreclosure, it named Ms. Hickey as a party and alleged that her interest was subordinate to its own lien. Ms. Hickey was served, failed to appear, and a default judgment was entered against her. Two and a half years later, she moved to set aside the judgment pursuant to CR 60(b)(4), making a strong showing that the bank's complaint

misrepresented her lien as subordinate. But she disclaimed knowing what "subordinate" meant and presented no evidence from which the trial court could find that the bank's misrepresentation accounted for her failure to respond to the complaint.

Notably, in *Hickey* it was Ms. Hickey who was seeking to overturn a trial court's equitable decision and who bore the burden in her appeal of showing an abuse of discretion; here, it is OB-1 who bears the burden of showing that the trial court acted on untenable grounds or for manifestly unreasonable reasons.

The record includes clear and convincing evidence from which the trial court could reasonably conclude that it was OB-1's confusing pursuit of collection (confusing in light of the September 2006 order and OB-1's several unexplained delays in proceeding) that accounted for Mr. Pinson's and Mr. Vinson's failure to respond and fully present their case. The court had before it the two men's sworn testimony to that effect. It had OB-1's unexplained 17-month delay in entering the stipulation of dismissal. It had OB-1's 19-month delay in acting on its default judgment, a delay that the trial court concluded cost Mr. Pinson and Mr. Vinson their ability to move to vacate the judgment on excusable neglect grounds. This alone would suffice as a basis for vacating the judgment. *See Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 309, 863 P.2d 1377 (1993) (alleged misconduct which prevents a party from applying for relief under CR 60(b)(1), which would have been granted, prevents a party from fully and fairly

presenting its case), *review denied*, 124 Wn.2d 1006 (1994). Finally, it had the representation by the parties that Cascades' 2004 lawsuit had been "intensely" litigated by Cascades. *See, e.g.*, CP at 162. OB-1 offered no reason why, having vigorously defended Cascades, Mr. Pinson and Mr. Vinson would fail to take any action to defend themselves individually. The court was left with Mr. Pinson's and Mr. Vinson's explanation—a reasonable one—that they simply did not realize the papers served on them were unrelated to the lawsuit being actively defended by Cascades' lawyers.

OB-1 has not demonstrated that the trial court abused its discretion in finding that OB-1's manner of proceeding accounted for Mr. Pinson's and Mr. Vinson's failure to respond to the complaint.

II.

OB-1 next challenges the trial court's premise for finding misconduct—its conclusion that OB-1 had a duty to call the September 2006 order to the judge's attention at the time it moved for default judgment, thereby making its failure to do so misconduct, and misleading. CR 60(b)(4) contemplates a broad definition of fraud, including extrinsic and intrinsic fraud, misrepresentation, and other misconduct. *Suburban Janitorial*, 72 Wn. App. at 308 n.8. In applying the rule, it is immaterial whether a misrepresentation is innocent or willful; "The effect is the same whether the misrepresentation was innocent, the result of carelessness, or deliberate." *Hickey*, 55 Wn. App. at 371.

OB-1 argues that it had no duty to disclose the existence of the September 2006 order in presenting its order and judgment for default, because Mr. Pinson and Mr. Vinson were never parties to Cascades' 2004 lawsuit. While it named them third party defendants in an amended answer filed with the court, it argues that it never followed up by serving them with process in that action.[2]

The trial court's finding of implicit misconduct did not depend on Mr. Pinson's and Mr. Vinson's being parties to Cascades' 2004 lawsuit, however. The September 2006 order reveals the concern of the trial court that because the corporate parties had offsetting claims, both should be resolved before entering judgment, so that the judgment could be net of any offset. The same concern is reflected in Washington statutes and case law. *See* RCW 4.56.060-.075 (prescribing form of judgments in the case of offsets); *Fluor Enters., Inc. v. Walter Constr., Ltd*., 141 Wn. App. 761, 767-68, 172 P.3d 368 (2007) (partial judgment is unenforceable; final judgment should await resolution of all claims in order, inter alia, to offset judgments favorable to each side before enforcement takes place (citing *Loeffelholz v. Citizens for Leaders With Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 694, 82 P.3d 1199 (same), *review denied*, 152

[2] Messrs. Pinson and Vinson argue that we should not entertain this argument for three reasons: it was not raised in the trial court; the record on appeal, in which OB-1 sometimes asserted that it *did* serve Pinson and Vinson in Cascades' 2004 lawsuit does not support it; and it is belied by OB-1's own action in stipulating to the dismissal of the third party claims. Br. of Resp'ts at 33-34. We choose to address OB-1's argument.

Wn.2d 1023 (2004))). Most, if not all, of OB-1's claims against Mr. Pinson and Mr. Vinson asserted in this action were purely derivative of Cascades' primary liability; even OB-1's lawyer explained the reason for the claims against the two individuals being that a substantial judgment against Cascades "would be virtually impossible to collect against Cascades. Therefore, we are adding a claim to pierce the corporate veil to go against the principals of Cascades. I submit this is the only equitable way that the defendants are going to be compensated." CP at 479. For OB-1 to secure and execute on a default judgment against Mr. Pinson and Mr. Vinson would defeat the deferral and offset intended by the September 2006 order. What is important is not whether Mr. Pinson and Mr. Vinson were parties to the September 2006 order. What is important is that OB-1 was.

OB-1 has not demonstrated that the trial court abused its discretion in concluding that, even if unintentional, its actions were contrary to the letter and spirit of the September 2006 order.

III.

Finally, OB-1 argues that in vacating the judgment, the court improperly speculated that had OB-1 provided the judge who entered the default with all relevant information, it "would, in all probability, have led that magistrate to deny the motion for default judgment." CP at 160. We note that the trial court couches its discussion in these

terms only once. Elsewhere, the court discusses the reason for its decision as based on OB-1's acts and omissions, not speculation about the thought process of the judge. CP at 159.

Washington cases hold that when ruling on a motion to vacate an ex parte judgment, courts can consider whether the judge who entered the order was fully informed of all relevant facts. A finding that he or she was not can bear on fraud, misconduct, or irregularity. *Wingard v. Heinkel*, 1 Wn. App. 822, 823, 464 P.2d 446 (default judgment was properly vacated where procured by fraud, "in that plaintiff had failed to disclose to the court relevant facts within his knowledge"), *review denied*, 77 Wn.2d 963 (1970). Where it is argued that important matters were not disclosed, the court must decide whether the undisclosed facts were relevant. Courts faced with this question sometimes speak of whether the judge "might" have acted differently if fully informed. We do not construe this as speculation about a particular judge's thought process; rather, it is a way of expressing the court's conclusion that the information was sufficiently relevant that it should have been disclosed. *E.g.*, *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 653, 774 P.2d 1267 (1989) (judge "may well have refused" to grant default judgment and order had he seen that critical signature had been crossed off).

We construe the court's statements in the letter ruling granting the motion to

vacate the same way. The test for relief from the judgment under CR 60(b)(4) is not what the magistrate would or would not have done, nor do we read the letter ruling to suggest that the trial court thought that it was. It is simply one way of expressing the court's conclusion that the matters that OB-1 failed to disclose were relevant and should have been disclosed.

We affirm and remand.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, A.C.J.

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Brown, J.