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WA State Court of Appeals, Division III

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

CAPITAL ONE BANK (USA), N.A.,	)	No. 29876-1-III
Respondent,	)	
v.	)	
JAMES A. GREEN,	)	UNPUBLISED OPINION
Appellant.	)	

Brown, J. • James A. Green, pro se, appeals the trial court's denial of his motion to vacate Capital One Bank's default judgment against him. Mr. Green contends the trial court erred because his motion to vacate was, under these particular facts, timely and his failure to appear in the underlying action was due to inadvertence. We agree with Mr. Green, and reverse.

FACTS

Capital One issued Mr. Green[1] a credit card, account number ending in 3373, which he thereafter allegedly used. Eventually, Mr. Green allegedly breached the

[1] Mr. Green, the appellant here, maintains that Capital One issued such credit to a different James A. Green.

contract by failing to make periodic payments. By January 20, 2010, he owed Capital One $2,576.03 on the account with prejudgment interest continuing to accrue. On April 26, 2010, Mr. Green was personally served with a summons and complaint for the debt owed to Capital One on the account, which specifically stated it was for the credit card ending in 3373. On July 21, 2010, Capital One filed the case in superior court. Since Mr. Green had not answered or appeared on the matter, Capital One moved ex parte for a default judgment. On July 22, 2010, the superior court entered default judgment against Mr. Green.

On July 29, 2010, Mr. Green moved to vacate the default judgment. He filed a declaration and response to the complaint along with attachments. In those pleadings, Mr. Green alleged he had responded on April 8, 2010 to a separate complaint served upon him by Capital One in April 2010, and mistakenly believed his response to the first complaint would serve as a notice of appearance on the second case since it was the same plaintiff and attorney. Although our record does not include pleadings from any separate case, the briefing from both parties appears to acknowledge Capital One had commenced collections for another credit account against Mr. Green.[2]

About August 3, 2010, Capital One received Mr. Green's motion to vacate. About October 12, 2010, Capital One received Mr. Green's affidavit, dated October 7, 2010.

[2] Mr. Green maintains that the other debt is also owed by someone other than himself, a claim which he apparently successfully defended.

On February 10, 2011, more than six months after moving to vacate, Mr. Green noted his motion for a hearing. The show cause hearing was set for February 23, 2011. Mr. Green mailed a copy of the order to Capital One, who received it on February 14, 2011. Capital One responded to the motion. Apparently the court heard argument, but no record of such hearing is before this court. On March 22, 2011, the court denied Mr. Green's motion, reasoning "service of the Motion to Vacate was improper under CR 60(e)(3)." Clerk's Papers (CP) at 11. Mr. Green appealed.

ANALYSIS

The issue is whether, under these facts, the trial court erred in denying Mr. Green's CR 60(b) motion to vacate the default judgment against him. Mr. Green contends his timely filed CR 60(b) motion should have been granted because his failure to appear was an inadvertent mistake and because other reasons justify relief from judgment.

We review the denial of a motion to vacate under CR 60(b) for abuse of discretion. *Vance v. Offices of Thurston County Comm'rs*, 117 Wn. App. 660, 671, 71 P.3d 680 (2003). "'Discretion is abused when it is exercised on untenable grounds or for 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)). Only the propriety of the denial, not the impropriety of the underlying judgment, is before the

reviewing court. *Barr v. MacGugan*, 119 Wn. App. 43, 78 P.3d 660 (2003).

Here, the trial court denied the motion solely because "service of the Motion to Vacate was improper under CR 60(e)(3)." CP at 11. CR 60(e) provides the procedure by which a judgment may be vacated. First, a party must file a motion stating the grounds for the requested relief, supported by an affidavit, "setting forth a concise statement of the facts or errors upon which the motion is based." CR 60(e)(1). Next, "the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted." CR 60(e)(2). And then, at issue here, "[t]he motion, affidavit, and the order to show cause shall be served upon all parties." CR 60(e)(3). Specifically, service shall be "in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing." CR 60(e)(3).

Apparently, service upon Capital One of such documents was via mail. No affidavits of service upon Capital One are in this record. And apparently, Mr. Green's failure to follow this rule was the reason the court denied his motion to vacate. "The apparent purpose of [CR 60(e)(3)] is purely to provide notice to an opposing party." *Lindgren v. Lindgren*, 58 Wn. App. 588, 593, 794 P.2d 526 (1990). "[V]acation of a judgment may not be entered when the adversary party to the motion to vacate has not been properly served and fails to appear for the motion." *Id.* (quoting *In re Marriage of*

Moore, 53 Wn. App. 687, 769 P.2d 881 (1989)). "However, when a copy of the motion is received by the attorney for the adversary party . . . and the party appears and defends the motion . . . it is clear that the party had adequate notice of the motion to vacate." *Id*. "If the adversary party has insufficient time to prepare for the motion because of defective service, this objection can be made so that the trial court can grant a continuance." *Id*. "As long as the party has a meaningful opportunity to be heard and adequate time to prepare, this technical deviation from proper procedure is inconsequential." *Id*. at 594.

Capital One received a copy of Mr. Green's motion in August 2010, a copy of his affidavit in October 2010, and a copy of the order setting the hearing more than a week before the hearing date. It responded to the motion and appeared at the hearing. Capital One was given a meaningful opportunity to be heard on the issue and so Mr. Green's deviation from CR 60(e)(3) was inconsequential. An inconsequential violation must be weighed in light of CR 1's admonition to construe the rules in order "to secure the just determination of every action." *See Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 583, 599 P.2d 1289 (1979). Mr. Green's failure to technically follow CR 60(e)(3) did not affect Capital One's ability to respond.

In sum, Mr. Green moved to vacate the default judgment one week after it was entered, and although he delayed several months in noting the motion for a hearing, he

was still well within the time limit provided by the court rules. The court rules do not state that a party must note the motion for a hearing. Capital One knew Mr. Green had moved to vacate the judgment within two weeks of it being entered. Under these facts, we conclude the trial court's denial of Mr. Green's motion for improper service under CR 60(e)(3) is untenable, and therefore, was an abuse of discretion.

Reversed.

A majority of the panel has determined 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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Brown, J.

WE CONCUR:

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Siddoway, A.C.J.

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Kulik, J.