

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

BETTER FOODS LAND INVESTMENT  
CO., a California limited partnership,

Respondent,

v.

RICK BOWLER, MARILEE THOMPSON,  
and ORIGINAL CENTERPOINTE, LLC a/k/a  
CENTERPOINTE, LLC, a dissolved and  
reinstated Washington limited liability  
company,

Appellants.

No. 38957-6-II

UNPUBLISHED OPINION

Armstrong, J. — Better Foods Land Investment Co. moved for default judgment against Rick Bowler and Marilee Thompson, the two members of Centerpointe, LLC, for failure to answer its complaint. Both Bowler and Thompson failed to appear, and the trial court granted default judgment. Five weeks later, Bowler and Thompson moved to vacate the default judgment. The trial court denied their motion. We affirm.

**FACTS**

In 2005, Better Foods entered into a contract to purchase a retail center in Vancouver, Washington from Centerpointe, LLC. As part of the sale, Centerpointe agreed to construct an access point to allow cars to enter the retail center from 88th Street. Centerpointe never completed the access

point. In March 2008, Better Foods filed a complaint against Centerpointe and its two members, Bowler and Thompson, in their individual capacities. Better Foods raised several claims for relief, including a claim for piercing the corporate veil. Bowler and Thompson never filed an answer to the complaint.

The contract mandated arbitration between Centerpointe and Better Foods. Better Foods moved to compel Bowler and Thompson to join the arbitration but the trial court denied the motion. The court ruled that Bowler and Thompson were not subject to the arbitration agreement because there was insufficient evidence to pierce the corporate veil. But the court limited its ruling to the arbitration agreement, stating:

It may well be that there are going to be two actions dealing with each of the same subject matters in both the arbitration and the subject litigation. If Better Foods chooses to proceed seeking additional remedies, this is precisely what was bargained for under the terms of the agreement.

Clerk's Papers (CP) at 235-36. Arbitration continued without Bowler and Thompson, and the arbitration panel awarded Better Foods \$490,000, plus costs and attorney fees.

Better Foods moved for default judgment against Bowler and Thompson on October 3, 2008. Bowler and Thompson did not appear at the default judgment hearing. On October 19, 2008, the trial court granted Better Foods' motion. Bowler and Thompson filed a motion to vacate default judgment on November 18, 2008, shortly after Better Foods began garnishing funds. The trial court denied the motion.

## ANALYSIS

### I. Standard of Review

We review a trial court’s ruling on a motion to vacate default judgment for abuse of discretion. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Showalter*, 124 Wn. App. at 510.

### II. Motion to Vacate Default Judgment

Although we favor resolving cases on their merits, default judgments serve the important purpose of promoting “an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.” *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007); *see also Showalter*, 124 Wn. App. at 510. When determining whether to grant a motion to vacate default judgment, the trial court examines four factors:

(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party’s failure to timely appear in the action, and answer the opponent’s claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

*White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The last two *White* factors are of secondary importance and cannot overcome the first two factors. *See Little*, 160 Wn.2d at 706.

#### A. Prima Facie Defense

Bowler and Thompson argue that they submitted sufficient evidence to support a prima

facie defense against Better Foods' veil-piercing claim. We disagree. They did not submit any evidence supporting a prima facie defense as part of their motion to vacate. They merely asserted that they were shielded from individual liability under RCW 25.15.125, and relied on the trial court's prior ruling denying Better Foods' motion to pierce the corporate veil and compel the defendants to join arbitration.

RCW 25.15.125 provides that members of a limited liability company (LLC) are generally not personally liable for debts of the LLC. But under RCW 25.15.060 "the court may consider the factors and policies set forth in established case law with regard to piercing the corporate veil." Better Foods brought such a veil-piercing claim in its complaint. The trial court expressly limited its prior ruling to the arbitration agreement, and alerted the parties that Better Foods could pursue its veil-piercing claim in litigation. Neither the statute nor the court's prior ruling established a prima facie defense.

Bowler and Thompson argue that the trial court record "contained abundant evidence supporting the prima facie defense." Br. of Appellants at 21 (citing *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979); *In re Marriage of Tang*, 57 Wn. App. 648, 789 P.2d 118 (1990)). While a trial court *may* look beyond the affidavits and declarations submitted with a motion and consider other evidence in the record, a trial court is not *required* to do so. *See Griggs*, 92 Wn.2d at 583-84; *Tang*, 57 Wn. App. at 653. The trial court did not abuse its discretion when it concluded, based on the evidence before it, that Bowler and Thompson failed to establish a prima facie defense.

B. Excusable Neglect

Bowler and Thompson argue that their failure to answer was due to mistake, surprise, and excusable neglect. They argue that several factors prevented them from learning of Better Foods' motion for default judgment until after the hearing: (1) the trial court's prior ruling on Better Foods' motion to compel arbitration "lulled [them] into a sense that they no longer needed to remain vigilant in the litigation," (2) their attorney withdrew on September 18, 2008, (3) Better Foods mailed notice of their motion to their property address, rather than their mailing address, and (4) they were out of town from September 27, 2008 to October 4, 2008, and the notice became buried in a backlog of mail. Br. of Appellant at 22-23; CP at 300. The trial court considered and rejected these arguments, and we find its decision was not manifestly unreasonable or based upon untenable grounds. *See Showalter*, 124 Wn. App. at 510.

Bowler's and Thompson's arguments focus on their failure to appear at the default judgment hearing. But the second *White* factor is actually based on "the moving party's failure to timely appear in the action, and answer the opponent's claim." *White*, 73 Wn.2d at 352. When denying their motion to vacate, the trial court found: "[T]he complaint was filed in March and . . . no answer was ever filed on behalf of Thompson and Bowler. And they had full opportunity to file the answer—eight, nine months." Report of Proceedings (RP) at 7. Bowler and Thompson offered no reason for their failure to answer Better Foods' complaint, other than their reliance on the trial court's prior ruling. This reliance does not constitute excusable neglect. As previously

discussed, the trial court alerted the parties that Better Foods could pursue additional remedies in litigation.

Furthermore, the trial court did not abuse its discretion by rejecting Bowler's and Thompson's remaining arguments. First, their attorney filed a notice of intent to withdraw on September 5, 2008, and they had almost two weeks to find new counsel before their attorney actually withdrew on September 18, 2008. Second, Better Foods properly mailed notice of the default judgment hearing to the address provided by Bowler's and Thompson's attorney in his notice to withdraw. Finally, Bowler and Thompson do not argue that they did not *receive* notice, but that they did not actually *find* the notice in their backlog of mail until after the default judgment. Under the court rules, notice is deemed complete three days after it is placed in the mail. CR 5(b)(2)(A). Whether the recipient actually reads the notice is legally insignificant. *Cf. Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 400-01, 196 P.3d 711 (2008) ("Nightrunners initially argues that it did not receive the notice until after the default hearing. But actual receipt is legally insignificant under the court rule's notice requirement. *See* CR 5(b)(2)(A)"). Thus, the trial court did not abuse its discretion when ruling: "Bowler and Thompson did receive notice. They did not respond to the notice. They only responded after the garnishment had occurred." RP at 8.

C. Due Diligence

Bowler and Thompson argue that the trial court abused its discretion under the third *White* factor by assessing their due diligence from the time Better Foods filed its complaint,

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rather than from the time they discovered the default judgment. But the last two *White* factors are of secondary importance and cannot overcome the first two factors. *See Little*, 160 Wn.2d at 704, 706. As discussed above, Bowler and Thompson failed to establish a prima facie defense or excusable neglect under the first two *White* factors. Thus, the trial court did not abuse its discretion when denying Bowler's and Thompson's motion to vacate default judgment. 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.

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Armstrong, J.

I concur:

Bridgewater, J.

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Penoyar, A.C.J. (conurrence) — I concur in the result because Better Foods Land Investment Co. failed to provide any evidence that the corporate veil should not have been pierced in this case or that the judgment amount was inappropriate.

Penoyar, A.C.J.