156 Wash.App. 1016

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

LAKEWEST CONDOMINIUM OWNERS ASSOCIATION, Appellant,
v.
TOKIO MARINE & Nichido Fire Insurance Company, Ltd., Respondent.

No. 62852–6–I.
|
June 1, 2010.

Appeal from King County Superior Court; Honorable Michael J. Trickey, J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

DWYER, C.J.

***1** The Lakewest Condominium Owners Association challenges the trial court's order vacating a default judgment obtained against Tokio Marine & Nichido Fire Insurance Company, Ltd. The motion to vacate was brought on CR 60(b)(5) and CR 60(b)(11) grounds. Based on the record herein, we cannot find a basis supporting the trial court's order. Accordingly, we reverse.

I

Lakewest Condominiums is located in Seattle, near Lake Union. In 2005, the Lakewest Condominium Owners Association discovered that several Lakewest buildings would need major repairs due to severe damage from rain. Lakewest hired an engineering firm to investigate the damage and hired a construction company to provide an estimate for making the necessary repairs.[1] The estimated repair cost was in excess of $4.8 million.

1 Lakewest paid $48,375.60 for the investigation and estimate.

Lakewest filed claims for the damage with numerous insurance companies based on policies issued by the various insurers from 1989 to 2006. Two policies from Traders & Pacific Insurance Company covered Lakewest, one from March 22, 1993 to October 1, 1993 and the other from October 1, 1993 to October 1, 1994. At the time each of these policies was issued, Traders & Pacific was wholly owned by Houston General Insurance Company, which was a directly-owned subsidiary of Tokio Marine & Fire Insurance Company, Ltd., a Japanese corporation (Tokio–Japan).

Lakewest discovered that Traders & Pacific, along with Houston General, had been sold by Tokio–Japan but none of the subsequent owners had acquired Traders & Pacific's preexisting liabilities or policies. Ultimately, an employee of one subsequent owner suggested that Lakewest should file its claim with Tokio through Tokio's third-party administrator, Cunningham & Lindsey. Cunningham & Lindsey subsequently denied Lakewest's claim, stating that the damage was excluded under the policies' language.[2]

2 Cunningham & Lindsey's initial response to Lakewest's tender explained that Cunningham & Lindsey handled claims arising out of policies issued by Traders & Pacific, including the policies that covered Lakewest.

Subsequently, in May 2007, Lakewest filed suit against seven different insurance companies, including Tokio. Lakewest served Tokio through the Washington State Insurance Commissioner. The insurance commissioner certified that it had served Tokio through the company's New York office. The New York office location is the

office for the United States' branch of Tokio (Tokio–U.S.). Tokio–Japan established Tokio–U.S. in 1911 so that it could conduct insurance business in the United States. Tokio–U.S. is authorized to sell insurance in the State of Washington and has consented to and authorized the Washington State Insurance Commissioner to accept service of process on Tokio–U.S.'s behalf.

The summons and complaint were delivered to Tokio–U.S.'s mailroom, where an employee signed for receipt of the documents. However, Tokio's registered agent and general counsel, B. Steven Goldstein, claimed to have never personally received the documents.

Tokio failed to appear in Lakewest's lawsuit. Eventually, Lakewest moved for entry of an order of default against Tokio. The trial court granted Lakewest's motion in August 2007. Then, in October 2007, Lakewest moved for entry of a default judgment against Tokio. The trial court granted the motion. Lakewest's complaint did not state a specific amount of damages, but, in determining the amount of damages to award, the trial court considered the declarations and supporting documents from Lakewest's structural engineer and Lakewest's contractor. The trial court granted all of Lakewest's requested damages in the amount of $7,525,530.15, including more than $2.6 million in attorney fees based on a 35 percent contingency fee agreement.[3]

3 The trial court found that the award of $2,633,935.55 in attorney fees was necessary to fully compensate Lakewest for the damage it had sustained.

***2** At the same time that it obtained the default judgment, Lakewest moved to amend the case caption, its complaint, and the order of default in order to change Tokio's denotation from "Tokio Marine & Fire Insurance Company, Ltd." to "Tokio Marine & Nichido Fire Insurance Company, Ltd."[4] The trial court granted Lakewest's motion to amend. Lakewest did not serve a copy of the amended complaint on Tokio.

4 This alteration was intended to reflect the change in the company's name after the 2005 merger of Tokio–Japan and the Nichido Fire Insurance Company. After completion of the merger, Tokio–Japan's and Tokio–U.S.'s names were changed to add "Nichido." In the same motion to amend the complaint, Lakewest detailed (1) that one of the three insurance policies listed in the original complaint did not cover Lakewest, so Lakewest wanted to remove that policy from the complaint, and (2) that the original complaint contained an incorrect digit for one of the two insurance policies that did cover Lakewest.

More than one year after entry of the default judgment, Lakewest sent Tokio a letter demanding satisfaction of the judgment. Tokio claimed not to be aware of the proceeding against it until this time. Tokio then entered an appearance and moved to vacate the default judgment. Subsequently, the trial court[5] vacated the default judgment without entering findings of fact or conclusions of law.

5 The judge who vacated the default judgment was not the same judge who granted the default judgment.

Lakewest appealed from the trial court's order granting Tokio's motion to vacate the default judgment.

Tokio then moved in the trial court for a stay of the proceedings against the remaining defendant insurance companies pending resolution of Lakewest's appeal.[6] The trial court granted the stay. In support of a motion for reconsideration of the stay, Lakewest included new documentary evidence—related to the question of whether Tokio–U.S. and Tokio–Japan are the same entity—that had not been presented to the trial court at the time it considered the motion to vacate the default judgment. The motion for reconsideration was denied.

6 Two of the insurance companies had been dismissed from the action with prejudice, leaving four insurance companies, in addition to Tokio, involved in the case.

II

Default judgments are generally disfavored in Washington because "[w]e prefer to give parties their day in court and have controversies determined on their merits." *Morin v. Burris*, 160 Wash.2d 745, 754, 161 P.3d 956 (2007). However, our policy of disfavoring default judgments is constrained by applicable court rules. CR 55 governs default judgments. When a party against whom a judgment is sought has failed to appear, an entry of default may be ordered. CR 55(a). Subsequently, a default judgment may be entered. CR 55(b). However, CR 55 also provides that "if a judgment by default has been entered, [the trial court] may likewise set it aside in accordance with rule 60(b)." CR 55(c)(1). CR 60(b) provides, in relevant part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his 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;
>
> ...
>
> (5) The judgment is void;
>
> ...
>
> (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.

Tokio moved to vacate the default judgment entered against it based on CR 60(b)(5) and CR 60(b)(11). The trial court did not enter written findings of fact and conclusions of law or otherwise articulate its reasoning for granting the motion. Lakewest contends that no basis existed for the trial court to have vacated the default judgment. Thus, we consider in turn each of the potential bases articulated by the parties.

III

***3** Lakewest first contends that the trial court could not properly vacate the default judgment pursuant to CR 60(b)(5). Tokio argued before the trial court that service of process was improper because Lakewest had served Tokio–U.S. with the summons and complaint but had obtained the default judgment against Tokio–Japan. Thus, Tokio argued, the superior court did not have personal jurisdiction over Tokio–Japan. Lakewest contends that Tokio–U.S. and Tokio–Japan are the same entity and, therefore, personal jurisdiction existed. The determination of whether Tokio–Japan and Tokio–U.S. are the same entity or, conversely, are separate entities is a *factual* question. However, the trial court made no factual findings. The lack of necessary factual findings by the trial court precludes us from determining the answer to the following question: was it proved in the trial court that the party against whom the judgment was entered was not the same entity as the entity that was served?

In their briefing and in oral argument before this court, the parties evinced much confusion as to our role in this dispute, the applicable standard of review that we are to apply, and the trial court's role. Each party treated the question presented—whether the entity against which judgment was entered was the same entity as that which was served through the Office of the Insurance Commissioner—as a question of law. It is not.

We review de novo questions of law and the application of the law to established facts. *Attorney Gen.'s Office, Public Counsel Section v. Utils. & Transp. Comm'n,* 128 Wash.App. 818, 827, 116 P.3d 1064 (2005). Thus, when the underlying facts are undisputed, the determination of whether a superior court has personal jurisdiction is a question of law that we review de novo. *Lewis v. Bours,* 119 Wash.2d 667, 669, 835 P.2d 221 (1992) (quoting *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.,* 60 Wash.App. 414, 418, 804 P.2d 627 (1991)). Similarly, where the dispute as to personal jurisdiction is presented, pretrial, in the form of a summary judgment motion, we apply traditional CR 56 de novo review. *CTVC of Hawaii, Co., Ltd. v. Shinawatra,* 82 Wn.App. 699, 707–08, 919 P.2d 1243, 932 P.2d 664 (1996).

Where the personal jurisdiction question arises from the assertion of long-arm jurisdiction, *see* RCW 4.28.185, and the motion is brought pretrial, the court treats the allegations in the complaint as established to determine whether the plaintiff has met its burden of setting forth a prima facie case that the necessary elements of long-arm jurisdiction are met. *Freestone Capital Partners v. MKA Real Estate Opportunity Fund I, LLC,* No. 63321–0–I, 2010 WL 1645389, at *2–*3 (Wash.Ct.App. April 26, 2010).

None of the above-described situations is present here, although the repetition of the phrase "de novo review" in those cases may help explain the parties' misperceptions in this case.

Although dressed up with many evidentiary bells and whistles, this case presents a simple factual question: was the party against whom the default judgment was entered actually served with the summons and complaint? Such an issue has arisen on numerous occasions in the past.

***4** It is an unremarkable proposition that "[p]roper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void." *In re Marriage of Markowski,* 50 Wash.App. 633, 635–36, 749 P.2d 754 (1988) (citing *Mid–City Materials, Inc. v. Heater Beaters Custom Fireplaces,* 36 Wash.App. 480,

674 P.2d 1271 (1984)). Where the entity against whom the judgment was entered was not the entity served, the judgment is void due to lack of personal jurisdiction. *See Painter v. Olney*, 37 Wash.App. 424, 427, 680 P.2d 1066 (1984). Trial courts have a nondiscretionary duty to grant relief from default judgments that are entered by courts without personal jurisdiction. *Leen v. Demopolis*, 62 Wash.App. 473, 478, 815 P.2d 269 (1991); *Markowski*, 50 Wash.App. at 635, 749 P.2d 754.

However, "[a]n affidavit of service that is regular in form and substance is presumptively correct." *In re Dependency of A.G.*, 93 Wash.App. 268, 277, 968 P.2d 424 (1998). Thus, the party *challenging* service bears the *burden of proving* improper service by clear and convincing *evidence*. *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918); *Vukich v. Anderson*, 97 Wash.App. 684, 687, 985 P.2d 952 (1999) (quoting *Woodruff v. Spence*, 88 Wash.App. 565, 571, 945 P.2d 745 (1997)). Clear and convincing evidence exists "when the evidence shows the *ultimate fact at issue* to be highly probable." *In re Dependency of K.S.C.*, 137 Wash.2d 918, 925, 976 P.2d 113 (1999) (emphasis added). On appellate review, to sustain a finding in favor of the defendant-movant, there must be substantial evidence in the record from which a rational trier of fact could have found the necessary facts by clear and convincing evidence. *See K.S.C.*, 137 Wash.2d at 925, 976 P.2d 113.

In this instance, a postjudgment motion brought by a defendant to vacate the judgment, the superior court is the "rational trier of fact" referenced.

The trial court has no discretion in deciding whether to vacate a default judgment once it has found that it lacks personal jurisdiction; but, in determining a challenge based on an allegation that the defendant/judgment debtor was never served with the summons and complaint, the trial court must exercise its fact-finding responsibilities. This is because "[t]he function of ultimate fact finding is exclusively vested in the trial court." *Edwards v. Morrison–Knudsen Co.*, 61 Wash.2d 593, 598, 379 P.2d 735 (1963). This is why we review issues of fact only for substantial evidence. *See Dodd v. Polack*, 63 Wash.2d 828, 829, 389 P.2d 289 (1964). Appellate courts are simply "not in a position either to take evidence or to weigh contested evidence and make factual determinations." *State v. Walker*, 153 Wash.App. 701, 708, 224 P.3d 814 (2009).

When the facts are disputed and unclear, the trial court must enter the necessary factual findings to support its conclusion that the defendant has either proved by clear and convincing evidence that it was not properly served or has failed to so prove. Following that, should there be an appeal, we utilize those facts found by the trial court, when they are supported by substantial evidence in the record, to review de novo the legal conclusion of whether the defendant has shown by clear and convincing evidence that the trial court lacked personal jurisdiction at the time the default judgment was entered. Thus, when the underlying facts are disputed and the record is unclear, the lack of factual findings by the trial court prevents meaningful review because, as here, there are no facts established to which we can apply the law.[7]

7 Included within the record on appeal are several documents that Lakewest submitted to the trial court after the default judgment was vacated. Generally we consider only the evidence that was before the trial court at the time the decision was made. *See* RAP 9.11 (additional evidence on review). Given our resolution of the issue presented, however, this irregularity is of no moment.

***5** The trial court herein did not enter any factual findings regarding whether or how Tokio proved by clear and convincing evidence that it had not been properly served. Crucially, the trial court did not enter the necessary factual finding—that the party against whom the judgment was entered was not the entity actually served—that would allow us to determine that the default judgment was void for lack of personal jurisdiction. Indeed, there is nothing in the record from which we can conclude that the trial court believed this fact to be proved. The lack of necessary factual findings is likely attributable to the parties, who even on appeal mischaracterize the issue presented as a question of law. We cannot uphold the order vacating the default judgment on the basis that the trial court lacked personal jurisdiction without findings of fact, especially when the burden of proof is assigned to the defendant-movant and that burden is the high burden of clear and convincing evidence.

Both parties erred in treating as a question of law the determination of whether Tokio–Japan and Tokio–U.S. are different entities such that service through the insurance commissioner upon Tokio–U.S. was insufficient to obtain personal jurisdiction over Tokio–Japan. But Tokio–Japan, as the party challenging service after the default judgment had been entered, had the burden of proving that service was insufficient. *See Vukich*, 97 Wash.App. at 687, 985 P.2d 952. Not having obtained findings of fact in its favor from the trial court, we can only conclude that Tokio failed to prove a crucial factual question. Therefore, the trial court's order cannot be affirmed on this basis.

IV

A trial court's ruling on a motion to vacate a default judgment on grounds other than CR 60(b)(5) is reviewed for an abuse of discretion. *Showalter v. Wild Oats,* 124 Wash.App. 506, 510, 101 P.3d 867 (2004). " 'Discretion is abused when it is exercised on untenable grounds or for untenable reasons.' " *Luckett v. Boeing Co.,* 98 Wash.App. 307, 309–10, 989 P.2d 1144 (1999) (quoting *Lane v. Brown & Haley,* 81 Wash.App. 102, 105, 912 P.2d 1040 (1996)). "Abuse of discretion is less likely to be found if the default judgment is set aside." *Griggs v. Averbeck Realty, Inc.,* 92 Wash.2d 576, 582, 599 P.2d 1289 (1979).

V

Lakewest next contends that CR 60(b)(1) does not provide the trial court with a proper basis to vacate the default judgment. We agree.

CR 60(b)(1) provides that a judgment can be vacated if the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect. However, motions to vacate based on CR 60(b)(1) must be made within one year after entry of the judgment. CR 60(b). This one year time limit is strictly enforced as the court "may not extend the time for taking any action under rule[ ] ... 60(b)." CR 6(b).

Tokio argued before the trial court that its failure to appear in the action was due to the fact that the summons and compliant received in Tokio–U.S.'s mailroom were never delivered to B. Steven Goldstein. Tokio asserted that this "mailroom mix-up" constituted excusable mistake, inadvertence, or neglect. These contentions may fall within the ambit of CR 60(b)(1). *Friebe v. Supancheck,* 98 Wash.App. 260, 267, 992 P.2d 1014 (1999). However, Tokio–Japan brought its motion to vacate more than one year after the default judgment was entered. Thus, CR 60(b)(1) contentions were time barred, and the facts tending to show mistake, inadvertence, or excusable neglect could provide no proper basis for the trial court's order vacating the default judgment.

VI

***6** Lakewest also contends that CR 60(b)(11) did not provide the trial court with a proper basis to vacate the default judgment due to the "mailroom mix-up." We agree.

CR 60(b)(11) is a "catchall" provision granting the trial court discretion to vacate an order or judgment for "[a]ny other reason justifying relief from the operation of the judgment." However, application of this provision is confined to situations involving extraordinary circumstances not covered by other sections of CR 60(b). *In re Marriage of Yearout,* 41 Wash.App. 897, 902, 707 P.2d 1367 (1985) (quoting *State v. Keller,* 32 Wash.App. 135, 140, 647 P.2d 35 (1982)). The claimed circumstances must relate to irregularities that are extraneous to the trial court's action or go to the question of the regularity of its proceedings. *In re Marriage of Flannagan,* 42 Wash.App. 214, 221, 709 P.2d 1247 (1985) (citing *Keller,* 32 Wash.App. at 140, 647 P.2d 35).

"CR 60(b)(11) cannot be used to circumvent the one-year time limit applicable to CR 60(b)(1)." *Friebe,* 98 Wash.App. at 267, 992 P.2d 1014. Therefore, when a motion to vacate is brought more than one year after entry of the default judgment, such that CR 60(b)(1) is no longer available to the moving party, an argument for vacation of the judgment due to mistake, inadvertence, or excusable neglect cannot be made under CR 60(b)(11).

Tokio complains that had Lakewest not waited more than a year from the entry of judgment to notify Tokio, Tokio would have been able to satisfy the requirements of CR 60(b)(1). However, for the plaintiff to wait over a year to collect on a default judgment, in order to employ the Civil Rules to the plaintiff's advantage, has long been held not to be inequitable, unfair, or deceptive. *Friebe,* 98 Wash.App. at 267, 992 P.2d 1014; *Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.,* 36 Wash.App. 280, 285–86, 673 P.2d 634 (1983). For us to require that the default judgment be enforced within one year in order to preserve the defendant's potential claims under CR 60(b)(1), (2), and (3) would create a burden on the plaintiff that the Civil Rules do not impose.

Because Tokio's arguments for vacation of the default judgment due to the "mailroom mix-up" are based on circumstances encompassed within CR 60(b)(1), they are not a proper basis to vacate under CR 60(b)(11). *Friebe,* 98 Wash.App. at 267, 992 P.2d 1014. In addition, it was not inequitable for Lakewest to wait over a year to begin enforcement of the default judgment. *Allison,* 36 Wash.App. at 285–86, 673 P.2d 634. Therefore, neither the "mailroom mix-up" nor the fact that Lakewest delayed enforcement of the default judgment supports the trial

court's order vacating the default judgment.

VII

Lakewest next contends that the trial court lacked a basis under CR 60(b)(11) to vacate the default judgment premised on the fact that Lakewest was allowed to amend the case caption, the complaint, and the order of default without providing notice to Tokio.[8] We agree.

[8] Lakewest asserts, in part, that the trial court could not vacate the default judgment based on the amendments to the complaint because Tokio did not provide any evidence that the amendments caused the entry of the judgment. Appellant's Brief at 29 (citing *Lindgren v. Lindgren*, 58 Wash.App. 588, 596, 794 P.2d 526 (1990)). But this analysis applies when a defendant moves to vacate based on CR 60(b)(4), asserting fraud or misrepresentation. Tokio never contended that CR 60(b)(4) provided a basis for vacation of the default judgment. Respondent's Brief at 16. Therefore, we do not apply the *Lindgren* test to the circumstances herein.

Parties in default are not entitled to service of pleadings unless those pleadings assert new or additional claims. CR 5(a).[9] The change of Tokio's denotation to include the word "Nichido" did not add a new or additional claim and did not alter the party. *Cf. Markowski*, 50 Wash.App. at 636–37, 749 P.2d 754 (holding that because dissolution was a new, additional, different claim than separation decree, wife was required to provide personal service and summons on husband). Rather, it was intended to correct a previously misnamed defendant who had already been served. *See Entranco Eng'rs v. Envirodyne, Inc.,* 34 Wash.App. 503, 505–06, 662 P.2d 73 (1983) (holding that the trial court erred in vacating a default judgment based on the incorrect party being named in the complaint and in the default judgment because "[a] judgment [containing a mere misnomer of a party defendant], whether by default or after full proceedings, is as conclusive against such a party as it would be if the party were described by its correct name"); *In re Marriage of Morrison*, 26 Wash.App. 571, 574, 613 P.2d 557 (1980) ("Where the real defendant is identifiable from the record or has actually been personally served, some error in the name is not fatal.... The test is whether the defendant has been prejudiced by not being properly named."); *see also Prof'l Marine Co. v. Those Certain Underwriters at Lloyd's,* 118 Wash.App. 694, 705, 77 P.3d 658 (2003). In addition, the alteration to the relevant insurance policy number similarly did not assert a new or additional claim.

[9] CR 5(a) provides, in relevant part: "No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in rule 4."

***7** Tokio, as a defendant in default, was not entitled to service of the amended complaint after the entry of the default order because no new or additional claims for relief were stated within the amended pleadings. Therefore, the amendments herein made to the complaint and to the order of default do not provide a basis to affirm the trial court's order vacating the default judgment.

VIII

Lakewest next contends that the trial court could not properly vacate the default judgment based on CR 60(b)(11) premised upon Tokio's assertion that it was not able to present evidence and argument at the hearing on damages. We agree.

Due process does not require that a defendant already adjudged to be in default be given notice of subsequent proceedings, including a damages hearing. *Conner v. Universal Utils.*, 105 Wash.2d 168, 172, 712 P.2d 849 (1986). "By failing to appear and defend in a lawsuit, 'a defaulting defendant bears the risk of surprise at the size of a default judgment.' " *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson,* 95 Wash.App. 231, 240–41, 974 P.2d 1275 (1999) (quoting *J–U–B Eng'rs, Inc. v. Routsen,* 69 Wash.App. 148, 151 n. 2, 848 P.2d 733 (1993)).

In granting the default judgment, the trial court held a hearing to establish Lakewest's damages, reviewed the evidence presented by Lakewest in support of its damages request, and entered findings of fact and conclusions of law pursuant to CR 55(b)(2).[10] The process followed by the trial court constituted a reasonable inquiry.

[10] Pursuant to CR 55(b)(2), judgment after default may be entered as follows:

> *When Amount Uncertain.* If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as are deemed necessary or, when

> required by statute, shall have such matters resolved by a jury. Findings of fact and conclusions of law are required under this subsection.

Tokio contends that the trial court must conduct a "reasonable inquiry to determine the amount of damages" and that this inquiry must be conducted by providing the defendant with an "opportunity to produce evidence, cross-examine witnesses, and present argument as to the costs of the designated cure." *Smith v. Behr Process Corp.*, 113 Wash.App. 306, 333–34, 54 P.3d 665 (2002). However, *Smith* does not stand for the proposition that a reasonable inquiry can be accomplished only if the defendant is present at the damages hearing and given an opportunity to contest the damages award requested by the plaintiff. Where a defendant has made no appearance in the action, due process does not entitle such a defendant in default to attend the damages hearing in order to contest the requested damages. *Conner*, 105 Wn.2d 172–73. The situation in *Smith*, the authority cited by Tokio, was much different. There, the defendant had appeared and participated in the lawsuit; the order of default was entered as a sanction for the defendant's willful discovery violations. *Smith*, 113 Wash.App. at 316, 54 P.3d 665. In contrast, at the time of the damages hearing herein, Tokio had made no appearance whatsoever in this lawsuit. Accordingly, it had been ordered to be in default. As a party in default, Tokio was neither entitled to receive notice of the damages hearing nor to participate in the hearing. Therefore, the trial court's order vacating the default judgment cannot be affirmed on this basis.

IX

***8** Tokio argues for the first time on appeal that vacation of the default judgment, pursuant to CR 60(b)(11), should be affirmed because the default judgment was entered against only Tokio even though there were multiple defendants involved in the underlying action. We disagree.

Tokio contends that entry of a default judgment against one defendant is not proper when there are multiple defendants in the underlying action. For this proposition, Tokio cites *Frow v. De La Vega*, 15 Wall. 552, 82 U.S. 552, 21 L.Ed. 60 (1872). In *Frow*, the United States Supreme Court held that where a complaint asserted that multiple defendants were jointly liable, it was improper to enter a default judgment against one defendant before the case against the other defendants had been decided on the merits. 82 U.S. at 554.

Tokio did not raise this claim to the trial court as a basis for vacating the default judgment. As it was not presented to the trial court, reliance on the *Frow* doctrine could not possibly have been the basis for the trial court's decision to vacate the default judgment.

Generally we will not consider a theory that was not presented to the trial court.[11] RAP 2.5(a); *John Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 780, 819 P.2d 370 (1991) (quoting *Talps v. Arreola*, 83 Wash.2d 655, 658, 521 P.2d 206 (1974)). Moreover, the *Frow* doctrine has not been recognized or applied by any Washington appellate court. Importantly, the continued viability of the *Frow* doctrine has been questioned in the federal courts. *See, e.g., In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1256–58 (7th Cir.1980); *Int'l Controls Corp. v. Vesco*, 535 F.2d 742, 746 n. 4 (2d Cir.1976).

[11] We can sustain the trial court's decision on any theory established by the pleadings and the proof, even if the trial court did not consider it. *LaMon v. Butler*, 112 Wash.2d 193, 200–01, 770 P.2d 1027 (1989). However, the proper theory must "be found within the pleadings." *Herron Nw., Inc. v. Danskin*, 78 Wash.2d 500, 501, 476 P.2d 702 (1970). Tokio's pleadings before the trial court did not address the *Frow* doctrine.

In the absence of a trial court record as to the appropriateness and applicability of the *Frow* doctrine in Washington in general and to this case in particular, we will not speculate either as to whether our Supreme Court would view the doctrine as an aspect of Washington law or as to whether the trial court herein would have viewed it as a proper basis to afford relief. That which we can state confidently, however, is that it clearly did not provide a basis for the trial court's order vacating the default judgment. Under these circumstances, it does not provide a basis for affirmance.

X

Tokio next contends that the trial court's order can be affirmed on the basis that it possessed a meritorious defense to Lakewest's claim.[12] The existence of this defense, Tokio asserts, provides a basis under CR 60(b)(11) for the trial court's order vacating the default judgment. Lakewest disagrees, asserting that the existence of a meritorious defense does not, in and of itself, provide

an independent basis for Tokio to have obtained relief under CR 60(b)(11). Lakewest is correct.

[12] Tokio claims it was a reinsurer and, as such, had a defense to the claim.

To obtain an order vacating a default judgment, the defendant must establish a basis to vacate the judgment pursuant to CR 60(b). CR 55(c)(1); *Griggs*, 92 Wash.2d at 582, 599 P.2d 1289 ("Relief from a judgment is governed by the [principles stated in *White v. Holm*, 73 Wash.2d 348, 438 P.2d 581 (1968)], but the grounds and procedures are set forth in CR 60."). [13] The mere existence of potential defenses is not an independent basis under CR 60(b) to vacate a default judgment.

[13] In *White*, our Supreme Court described four factors to be considered in determining whether to set aside a default judgment:

> (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.

73 Wn.2d at 352.

***9** Rather, the existence of a meritorious defense, as one of the four *White* factors, is a consideration in determining whether a default judgment should be vacated only when the motion to vacate is brought pursuant to CR 60(b)(1) or (11). *See, e.g., Little v. King*, 160 Wash.2d 696, 703–07, 161 P.3d 345 (2007) (applying the *White* factors when motion to vacate was brought pursuant to CR 60(b)(1)); *Topliff v. Chicago Ins. Co.*, 130 Wash.App. 301, 304–06, 122 P.3d 922 (2005) (applying *White* factors when motion to vacate was brought pursuant to CR 60(b)(11)). As previously noted by this court, "*White v. Holm* [ ] was based on language in former RCW 4.32.240 substantially similar to CR 60(b)(1)." *Peoples State Bank v. Hickey*, 55 Wash.App. 367, 370 n. 2, 777 P.2d 1056 (1989). Accordingly, the *White* factors are most often applied when the motion to vacate is brought pursuant to CR 60(b)(1). *Hickey*, 55 Wash.App. at 370, 777 P.2d 1056; *see, e.g., Little*, 160 Wash.2d 696, 161 P.3d 345; *Griggs*, 92 Wash.2d 576, 599 P.2d 1289; *Haller v. Wallis*, 89 Wash.2d 539, 573 P.2d 1302 (1978); *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wash.App. 191, 165 P.3d 1271 (2007).

Indeed, *Topliff* is the only published Washington appellate decision to apply the *White* factors when the motion to vacate was brought on grounds other than CR 60(b)(1). In *Topliff*, we held that the default judgment was properly vacated pursuant to CR 60(b)(11) because of an irregularity: the insurance commissioner inexcusably failed to forward process to the defendant insurer. 130 Wash.App. at 305–06, 122 P.3d 922. Only after determining that an irregularity existed, potentially warranting relief pursuant to CR 60(b)(11), did we then analyze the *White* factors, including the existence of a meritorious defense. *Topliff*, 130 Wash.App. at 308, 122 P.3d 922.

Here, Tokio has not demonstrated an irregularity within the ambit of CR 60(b)(11). Thus, the consideration of whether Tokio has a meritorious defense to liability is not at issue. Therefore, Tokio's assertion as to the merits of its potential defense cannot properly have provided a basis for the trial court's order vacating the default judgment. Tokio's assertion of a potential defense does not provide a basis for affirmance.

XI

Tokio next contends that the trial court erred by calculating the award of attorney fees with reference to the 35 percent contingent fee agreement between Lakewest and its lawyers.

Where a motion to vacate is properly and timely filed, potential relief includes the vacation of a damages award that was not supported by the evidence even in the absence of a meritorious defense to liability. *Calhoun v. Merritt*, 46 Wash.App. 616, 622, 731 P.2d 1094 (1986); *see also Shepard Ambulance*, 95 Wash.App. at 241, 974 P.2d 1275. Similarly, where a motion to vacate is properly and timely filed, potential relief includes the vacation of an award of attorney fees where the amount of the fees was improperly calculated. *See TMT Bear Creek*, 140 Wash.App. at 213–14, 165 P.3d 1271. In each instance—vacation of the damages award or vacation of the attorney fee award—the defendant's contention that the calculation was done improperly was, in effect, the assertion of the existence of a meritorious defense to the award.

***10** As discussed above, however, the existence of a meritorious defense is at issue only where relief is properly requested pursuant to CR 60(b)(1) or (11). Because no independent basis for relief under CR

60(b)(1) or (11) has been established herein, no partial relief (i.e., vacation of the attorney fee award) can be granted.

XII

Lakewest requests an award of attorney fees and costs on appeal based on RAP 18.1 and *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wash.2d 37, 53, 811 P.2d 673 (1991), because it was forced to bring this lawsuit and prosecute this appeal in order to obtain the benefits of its insurance policy.

An award of attorney fees to the insured is "*required* in any legal action where the insurer compels the insured to assume the burden of legal action" to obtain the full benefit of the insured's insurance contract. *Olympic S.S*, 117 Wash.2d at 53, 811 P.2d 673 (emphasis added). "*Olympic Steamship* stands for the proposition that '[w]hen insureds are forced to file suit to obtain the benefit of their insurance contract, they are entitled to attorneys' fees.' " *Butzberger v. Foster*, 151 Wash.2d 396, 414, 89 P.3d 689 (2004) (quoting *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 687 n. 15, 15 P.3d 115 (2000)).

Lakewest's entitlement to the full benefit of its insurance contract with Tokio was adjudicated through the entry of the default order and judgment. *Olympic Steamship* does not limit an insured's entitlement to an award of attorney fees only to circumstances where it was determined by trial or summary judgment that coverage existed under the insurance contract. Therefore, we grant the request for an award of fees and costs on appeal, as mandated by *Olympic Steamship*.

Upon proper application, a commissioner of this court will enter the necessary order.

Reversed.

We concur: APPELWICK and ELLINGTON, JJ.

All Citations

Not Reported in P.3d, 156 Wash.App. 1016, 2010 WL 2178825

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