



## Carr v. Tarnavsky

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MUNSON, J. Gladys Tarnavsky first appeared before the court in this foreclosure action at the hearing on the motion to confirm the sheriff's sale. She contends she was entitled to have the court establish a fair market value for her property, although the plaintiff Marvin Carr is not seeking a deficiency judgment and she makes no showing as to unusual market conditions. Ms. Tarnavsky also challenges denial of her request for a homestead exemption and alleges she was denied procedural due process. We affirm.

In August 1993, Ms. Tarnavsky signed a promissory note for \$65,000, secured by a mortgage on four parcels of land in Benton County. In February and March 1994, she failed to make the required monthly payments. Marvin Carr, holder of the note, commenced this action, personally serving Ms. Tarnavsky on March 28, 1994. Ms. Tarnavsky served Mr. Carr's attorney with a response, but did not file a copy with the court or otherwise appear in the proceedings. On April 20, Mr. Carr filed his motion for default judgment, with copies of the motion and notice of hearing mailed to Ms. Tarnavsky on April 17.

The default hearing was noted for May 5. When neither party appeared, the hearing was continued. There was no showing Ms. Tarnavsky was given notice of the continuance or the new date. On May 18, Mr. Carr obtained an ex parte order of default and decree of foreclosure. A notice of sheriff's sale was mailed to Ms. Tarnavsky on June 24. Mr. Carr purchased the property at the sheriff's sale on August 19. He noted a hearing to confirm the sheriff's sale, and Ms. Tarnavsky appeared on September 19 in response to the mailed notice of the hearing. The confirmation hearing was continued at Ms. Tarnavsky's request.

At the next hearing on September 28, Ms. Tarnavsky represented to the court that she had never received notice of the May 5 hearing on the motion for default judgment and the subject property had been recently appraised at a value of more than \$200,000. She asked the court to set a minimum upset price for the property and to consider separating a single parcel to be sold in satisfaction of the judgment. She also requested a \$30,000 homestead exemption.

The court ruled the request for a minimum price was untimely, denied the remaining requests, and confirmed the sale. Ms. Tarnavsky appeals.

First, Ms. Tarnavsky contends Mr. Carr failed to comply with the procedural requirements for a valid default judgment and decree of foreclosure.



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A civil action is commenced by service of a summons on a party against whom judgment is sought. CR 3. The summons must require the defendant to serve a copy of his appearance or defense on the person signing the summons. CR 4(a)(3), 4(b)(1)(ii), 4(b)(2) (paragraph 2 of form). An action by a party which recognizes the case as a court action constitutes an appearance. *Dlouhy v. Dlouhy*, 55 Wash. 2d 718, 349 P.2d 1073 (1960); see *Skilcraft Fiberglass, Inc. v. Boeing Co.*, 72 Wash. App. 40, 863 P.2d 573 (1993). Unless the party fails to appear or otherwise respond, an order of default and default judgment may not be entered without notice. CR 55(3).

In the event findings of fact and Conclusions of law are required to support the default judgment, persons who fail to appear may be deemed to have waived their right to notice of presentation of the findings. CR 52; *Tacoma Recycling, Inc. v. Capitol Material Handling Co.*, 34 Wash. App. 392, 661 P.2d 609 (1983).

Ms. Tarnavsky has placed in the record some evidence she responded to the summons by serving her response on Mr. Carr's attorney. <sup>1</sup> Indeed, the attorney's affidavit in support of Mr. Carr's motion for default indicates Ms. Tarnavsky responded by letter addressed to the attorney. Neither the actual summons nor the applicable rule specifies any particular form which the response must take. Having responded to the summons, Ms. Tarnavsky was entitled to notice of the hearing on the motion for default and the presentation of any findings.

Mr. Carr presented evidence that notice of the May 5 default hearing was mailed to Ms. Tarnavsky. Although the affidavit of mailing contains a typographical error in the address, Mr. Carr has provided an affidavit from the postmaster stating mail to Ms. Tarnavsky, even if improperly addressed, would have been placed in a post office box for delivery to her. But Mr. Carr has provided no indication Ms. Tarnavsky was served with either notice of the continuance of the default hearing to May 18 or a copy of the proposed findings. Thus, Mr. Carr failed to comply with the notice requirement of CR 55(3).

Default judgments are generally disfavored. *Griggs v. Averbek Realty, Inc.*, 92 Wash. 2d 576, 581-82, 599 P.2d 1289 (1979). The record would support vacation of the default judgment on the grounds of procedural irregularity. See *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wash. App. 647, 774 P.2d 1267 (1989); CR 60(b)(1). Ms. Tarnavsky has never moved to vacate the default judgment; therefore, the issue was not presented in the trial court and cannot be considered on appeal. RAP 2.5(a).

Ms. Tarnavsky also argues the lack of notice denied her due process right to notice and an opportunity to be heard. The record shows she had actual knowledge of the foreclosure before the sheriff's sale and chose not to challenge the proceedings until the confirmation hearing. She was not denied due process.

Second, Ms. Tarnavsky contends the trial court should have set a fair value or upset price for the property after she appeared at the confirmation hearing and objected to the sale price. The court is



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authorized to set a value for property even after a sheriff's sale "and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment. . . . If the fair value as found by the court, when applied to the mortgage debt, discharges it, no deficiency judgment shall be granted." RCW 61.12.060; *American Federal Sav. & Loan Ass'n v. McCaffrey*, 107 Wash. 2d 181, 728 P.2d 155 (1986). The decision to fix an upset price is within the trial court's discretion. *McCaffrey*, 107 Wash. 2d at 187.

The language of the statute, RCW 61.12.060, does not prescribe a resale at or above the fair value, and does not require an actual bid or payment of the fair value which would generate a surplus; the statute requires only that the fair value be credited against the amount of the judgment. In *McCaffrey*, the fair market value established by the court was less than the amount of the judgment and even after that price was credited against the judgment, a deficiency remained.

Here, Mr. Carr had expressly waived the right to a deficiency judgment in his complaint. He bid the amount of the judgment at the sheriff's sale, thereby eliminating any deficiency. Moreover, even after the confirmation hearing was continued for two weeks, Ms. Tarnavsky failed to provide the court with any documentary evidence or testimony supporting her claim as to the value of her property. The court did not abuse its discretion by confirming the sale without fixing an upset price.

Finally, Ms. Tarnavsky contends the court erred in refusing to grant her request for a homestead exemption. She argues RCW 6.13.080(2), which creates a mortgage foreclosure exception to the homestead allowance, is ambiguous and should be held void for vagueness.

Up to \$30,000 of a homestead is exempt from execution or forced sale.

RCW 6.13.030, .070. Applying the homestead exemption, the courts distinguish between a forced sale to satisfy a general money judgment and a sale to satisfy a debt secured by the property. See *Damascus Milk Co. v. Morriss*, 1 Wash. App. 501, 463 P.2d 212 (1969). The exemption protects the property from being sold to satisfy a general money judgment. RCW 6.13.070(1). But RCW 6.13.080 states:

The homestead exemption is not available against an execution or forced sale in satisfaction of judgments obtained:

(2) On debts secured (a) by security agreements describing as collateral the property that is claimed as a homestead or (b) by mortgages or deeds of trust on the premises that have been executed by the husband and wife or by any unmarried claimant; Ms. Tarnavsky argues that because RCW 6.13.080 creates exceptions to the overall purpose of the statutory scheme, which is to extend protection to all homesteads, it cannot mean what it says. The meaning of the statute is, however, well settled, based on sound reasoning, and is not rendered void by Ms. Tarnavsky's reluctance to believe she relinquished her right to the homestead exemption when she executed the mortgage securing the



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loan from Mr. Carr. See *First Nat'l Bank v. Tiffany*, 40 Wash. 2d 193, 196-97, 242 P.2d 169 (1952).

Because the homestead exemption was not available in this case, Ms. Tarnavsky's arguments regarding Mr. Carr's failure to comply with various procedural requirements relating to homesteads are irrelevant.

Mr. Carr has requested an award of attorney fees. A clause in the promissory note executed by Ms. Tarnavsky provides she will agree to pay reasonable fees if suit is brought to collect on the note. Carr is substantially the prevailing party, he is entitled to an award of reasonable attorney fees.

Affirmed.

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.

Ray E. Munson

WE CONCUR:

Dennis J. Sweeney

Frank L. Kurtz

1. The summons here states: "You must respond to this Summons and the Complaint by serving a copy of your written response on the person signing this Summons." Filing the answer or notice of appearance is required by CR 5(d)(1), but failure to file merely subjects the party to a motion for sanctions. CR 5(d)(2). Mr. Carr did not seek sanctions.

