IN THE SUPREME COURT
OF THE STATE OF OREGON

UNION LUMBER CO., INC., an Oregon corporation, dba Bronson Lumber Company, Plaintiff-Respondent Petitioner on Review,	Union County Circuit Court Case No. 10-07-46539
v.	CA No. A152241
RON R. MILLER and LINDA MILLER, Defendants-Appellants. Respondent on Review.	SC No. S062459

PETITIONER'S BRIEF ON THE MERITS ON REVIEW

Review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Union County, Honorable Russell B. West, Judge, and supplemental judgment of Honorable Brian Dretke, Judge.

Opinion filed: June 18, 2014

Author of Opinion: Timothy J. Sercombe, Judge
Concurring Judges: Darlene Ortega, Presiding; Erika Hadlock, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Statutes

A. Statement of Legal Question

1. Does the Plaintiff, the arbitrator, and the trial court's reliance on Defendants' Answer for determining the Defendants' "last known address" for mailing notices and pleadings, under ORCP 9 B, amount to the type of "mistake" authorizing relief from a judgment under ORCP 71 B(1)(a)?

2. What is the meaning of the term "violence to the regular disposition of litigation" in the context of dealing with granting relief under ORCP 71 B for mistake?

B. Statement of the Nature of the Action (or Proceeding)

Defendants appealed a trial court order denying their motion to set aside a judgment in favor of Plaintiff. The judgment, which awarded Plaintiff damages, was entered following an arbitration that was conducted without Defendants' participation. Among other things, Defendants assert that their absence from the arbitration and the consequential judgment in Plaintiff's favor occurred as a result of mistake, surprise, or excusable neglect, as well as the misconduct of Plaintiff's attorney. Defendants assert the trial court erred in not setting aside the judgment under ORCP 71 B.

C. Statement of the Fact of the Case

The source of this Statement of Facts is directly from the Court of Appeals opinion of Judge Sercombe. Plaintiff has made some edits to the facts as stated in

that opinion but, as a whole, Plaintiff agrees with the facts set forth in that opinion.

Plaintiff owns and operates building supply stores in Northeast Oregon. In June 2002, Defendant Ron Miller entered into an open account agreement with Plaintiff for building supply purchases. In July 2010, Plaintiff brought an action on that account against Defendant Ron Miller and his wife, Defendant Linda Miller, for the cost of goods purchased by Defendants' son, Ean Miller. The complaint sets out claims for breach of contract and unjust enrichment, alleging that Ean Miller purchased building supplies at Plaintiff's stores, charging the cost of the purchases to the account with his father's authority, and that the materials were used to improve Defendants' properties in Union County. The complaint sought $17,865 in damages as the "current unpaid balance on Defendant Ron Miller's account." The complaint was personally served on Defendant Linda Miller at the Millers' home in Burlington, Wisconsin, on August 3[, 2010]. Substituted service was obtained on her husband at that location in November 2010.

Each Defendant sent a "power of attorney" to Plaintiff's attorney, appointing Ean Miller as "my true and lawful attorney * * * to answer the complaint filed in Case No. 10-07-46539 * * *hereby ratifying and confirming all that my attorney lawfully does or causes to be done by virtue hereof." On August 30, 2010, Ean Miller filed the powers of attorney and Defendants' answer and counterclaim with the court. The answer asserted that the purchases were by Ean Miller and not to

his father's account or for his parents' benefit. The counterclaim pleaded that collection on the debt was stayed by the filing of Ean Miller's voluntary bankruptcy petition. The pleading was signed by "Ean Miller P.O.A." and identified "Defendant's Address" as " N 2nd St., La Grande, OR 97850."

The court referred the case to mandatory arbitration on March 2, 2011. *See* ORS 36.405(1)(a) (requiring referral for civil actions "where all parties have appeared" and the only relief claimed is damages in an amount not exceeding $50,000). The court appointed Glenn Null as the arbitrator of the case. The notice of that appointment shows that it was copied to Jonel Ricker (Plaintiff's counsel) and to "Ron Miller, etal *[sic]."* Later, the arbitrator sent letters to Ricker and to "Ean Miller POA," notifying them of potential hearing dates, the rates of his charges for services, and the time and place of the hearing. Those letters were sent to Ean Miller at the North 2nd Street address set out in Defendants' answer to the complaint. Ricker sent his prehearing statement of proof to Ean Miller at that same address.

The arbitration hearing occurred on May 26, 2011. Defendants did not appear or participate in the hearing. The arbitrator issued a "decision and arbitration award" the next day, again mailing a copy of the decision to Ricker and to "Ean Miller POA" at the North 2nd Street address. The decision notes that evidence was received and testimony taken at the hearing, Plaintiff's exhibits and

prehearing statement of proof were considered, and that "the bankruptcy defense [is] ineffective for Defendant because Defendant is not under bankruptcy protection." The arbitrator also found that "Ean Miller is not an attorney licensed to practice law in the State of Oregon" and granted “Plaintiff’s oral motion to dismiss Defendants’ Answer" on the grounds that "Ean Miller is not authorized by Oregon law" to file a pleading on Defendants' behalf. The decision concludes with an award that, "[h]aving heard the motions and testimony and fully reviewing the evidence received[,] it is the conclusion of this arbitrator that Plaintiff prevails on both claims for relief."

On June 16, 2011, Plaintiff’s counsel prepared and filed with the court a proposed judgment, attorney fee petition, and cost bill, serving copies of those documents on Ean Miller by mail to the North 2nd Street address. The court signed the judgment on July 14, 2011. Defendants learned of the judgment from their son shortly thereafter.

Defendants retained counsel and moved to set the judgment aside under ORCP 71 B. Defendants argued three grounds for relief: (1) mistake, inadvertence, surprise, or excusable neglect in failing to appear at the arbitration hearing; (2) because it was taken by default without notice to Defendants and because notice of the arbitration hearing had not been posted as required by ORS 36.420(1).

More specifically, Defendants and Ean Miller asserted in their declarations

that (1) the notices and pleadings in the case had been sent to Ean Miller and not to Defendants individually; (2) Ean Miller's authority to act on behalf of Defendants was limited by the power of attorney to signing and filing their answer to Plaintiff's complaint ("It was [our] intent to defend the remainder of this matter personally."); (3) Ean Miller changed his residence shortly after the answer was filed, filed a forwarding address with the post office, but never received documents related to the case until notice of the entry of the judgment was mailed to him; (4) after the case was filed, Defendant Ron Miller called an employee of Plaintiff, and"[s]he told me she was aware the allegations against me and my wife were false and I assumed that the case would be dropped"; (5) the building supplies had been charged to Ean Miller's account and had not been used to improve Defendants' properties; and (6) Ean Miller's debt to Plaintiff for the purchased supplies had been discharged in his bankruptcy.

Plaintiffs counsel alleged in response that the materials were used to improve specific properties owned by Defendants, that none of the pleadings, notices, and correspondence sent to Ean Miller by Plaintiff, the arbitrator, or the court were returned as undelivered, and that the powers of attorney were "ambiguous and vague."

After holding a hearing on the motion, the court ruled from the bench:

"Yeah. I guess I'm--I'm really not very sympathetic to your position,

> [Defendants' counsel], because the Millers were served. They chose not to get an attorney. They chose to rely on their son. And the matter went all the way through to arbitration. And, now, they come in and claim a problem when they could have solved the entire thing by getting an attorney in the first place and jumping through all the hoops.
>
> "To set this aside, will require the Plaintiffs to go back to square one and then file it all over again, incurring additional expense, which they could have avoided if the Millers had properly got an attorney and filed the proper response. I guess I'm not very sympathetic to your position here.
>
> "I'm going to deny the motion to set aside the judgment."

D. Summary of the Argument

Plaintiff submits the following as its summary arguments supporting its petition for review:

1. Plaintiff, the arbitrator, and the trial court did not commit the type of mistake authorizing relief from judgement, when they mailed notices and pleadings to Defendants at the address listed in Defendants' Answer as their mailing address as opposed to the address where service of process was accomplished.

2. Since under the arbitration proceeding, in the case at hand, Plaintiff followed all required procedures and attended and offered proof of their claim as both cost and time to Plaintiff and since Defendants sat idle for almost a year without checking on the status of such litigation, there is a violence to the regular disposition of litigation that affect Plaintiff adversely in this case.

E. Argument

ORCP 71 B(l) provides, in relevant part:

> "On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F; (c) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment."

ORCP 9 B specifies the manner of service:

> "Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party, by mailing it to such attorney's or party's last known address or, if the party is represented by an attorney, by telephonic facsimile communication device or e-mail as provided in sections F or G of this rule."

The Court of Appeals, in this case, specifically found that the actions of Defendants Ron and Linda Miller did not amount to excusable neglect under Rule 71 B. That finding is not being challenged in this appeal.

The Court of Appeals found 'mistake' on the part of the Plaintiff's counsel and the arbitrator for relying on the Answer, filed on Defendants' behalf, in making the determination that the mailing address, for future notices and

pleadings, was the “ N 2nd St., La Grande, OR 97850" address. Plaintiff also believes that the same address was used by the trial court in sending its notices.

Defendants, although residing out of state, had always used a local Union County, Oregon mailing address in dealing with Plaintiff, as well as using their son Ean Miller in all their dealings with Plaintiff. Proof of this fact can be seen on the Defendants’ credit application given to Plaintiff when the account was set up (that address was PO Box 111, Elgin, Oregon 97827) and is where Plaintiff mailed all invoices and billings for materials ordered and delivered to Defendants over the years. No notices or copies of pleadings were ever returned to Plaintiff or the arbitrator to put them on notice that the N 2nd Street address might not be a proper mailing address. Plaintiff submits that all parties were merely complying with Defendants’ own request on where to contact them with future notices and mailings.

Even though the Court of Appeals properly found that the Answer filed by Defendants was not in proper form because Ean Miller was not an attorney, Plaintiff’s counsel believed the purported Answer clearly showed that Defendants Ron and Linda Miller intended to file an appearance pursuant to ORCP Rule 69B and that moving for a default order and judgment was not appropriate. Instead, Plaintiff continued on with the arbitration process, but used the address provided in the purported answer as Defendants’ last known address since they asserted

under their filed documents that that address was theirs. Plaintiff submits that using this address was reasonable on its part which is supported by the fact that the arbitrator and the trial court made the same reasonable assumption.

The Court of Appeals also concluded that by vacating the judgment and forcing the parties back to square one in the arbitration process, that there will be no "violence to the regular disposition of litigation." Plaintiff submits this finding is erroneous. Plaintiff properly pursued its claim though arbitration. Defendants neglected the case to such a degree as to not being entitled to relief under ORCP 71 B. Plaintiff, the arbitrator, and the trial court gave Defendants notice of each stage of the process. Now Plaintiff must start over some 4 years later, ignoring the time and expense of going through the process before. It is hardly equitable to force Plaintiff back to the beginning of the proceedings, simply because Defendants did not feel the need to retain legal counsel to assist them in their defense or affirmatively supply the trial court and Plaintiff with updated mailing addresses during the course of the arbitration.

F. Conclusion

After complete review of the trial court file, reviewing materials filed by the parties on the issue of vacating the trial court judgment, and hearing oral argument

of counsel, Plaintiff submits that the trial court did not abuse its discretion in denying Defendants' ORCP Rule 71 Motion to Vacate Judgment. The decision of the Court of Appeals, as to the Plaintiff's and the arbitrator's mistake in using the Defendants' last known address as the one supplied by Defendants in their purported Answer, is in error. Plaintiff's original trial court judgment should be reinstated in full and Plaintiff should be awarded its costs and attorney's fees in these appeals. The Defendants' judgment from the Court of Appeals should be vacated in full.

Dated this 13th day of November, 2014.

/s/ Jonel K. Ricker

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CERTIFICATE OF SERVICE

I hereby certify that I directed the original PETITIONER'S BRIEF ON THE MERITS ON REVIEW to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on November 13, 2014.

I also hereby certify that on November 13, 2014, I emailed and mailed two true and correct copies of the foregoing Petitioner's Brief on the Merits on Review by US Postal Service mail, postage paid, upon the following party at the following addresses:

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CERTIFICATE OF COMPLIANCE

Brief Length. I certified that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief [as described in ORAP 5.05(2)(a)] is 2,425 words.

Type Size. I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and any footnotes, as required by ORAP 5.05(4)(f).

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