100970-4

No. 82405-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Terrace15, LLC, a Washington Limited Liability Company,

Respondent,

v.

MR. YONG S. KIM and JANE DOE KIM, individually and the marital community thereof,

Petitioners.

PETITION FOR REVIEW

INSLEE, BEST, DOEZIE & RYDER, P.S.
Christopher W. Pirnke, W.S.B.A. #44378
Attorneys for Petitioners

10900 NE 4th Street, Suite 1500
P.O. Box 90016
Bellevue, Washington 98009-9016
Telephone: (425) 455-1234
Facsimile: (425) 635-7720

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

I. IDENTITY OF PETITIONERS

Mr. Young S. Kim and Jane Doe Kim ask for review of the Court of Appeals decision terminating review set forth in Part II.

II. COURT OF APPEALS' DECISION

Division I of the Court of Appeals filed its opinion on March 14, 2022. A copy of that opinion is in the Appendix at pages A1 to A9. On April 27, 2022, the Court of Appeals denied Petitioners' Motion for Reconsideration. A copy of the order denying motion for reconsideration is in the Appendix at page B10.

III. ISSUES PRESENTED FOR REVIEW

A. Does a trial court err by striking late filed declarations without consideration of the *Burnet* factors, where although procedurally filed by a defaulted party, they were filed on a non-defaulted party's behalf?

B. Does a trial court err in granting summary judgment where, irrespective of whether Petitioners submitted affidavits or

other materials, Respondent failed to meet its burden under CR 56?

C. Where the trial court lacks jurisdiction to enter a default judgment against Petitioners' co-defendant, did the trial court improperly grant summary judgment against Petitioners?

IV. STATEMENT OF THE CASE

The Court of Appeals opinion sets forth the facts and procedure herein. Op. at 1-4. However, that opinion omits reference to several critical facts that impact this Court's review decision.

Largely omitted from Division I's factual discussion is how the lawsuit came to pass in the first place.

On or about July 20, 2018, a Commercial & Investment Real Estate Purchase & Sale Agreement was entered into by "Loft Haus – Terrace 15 LLC," as the seller, and "SYS Inc And/or Assigns" as the buyer, for the property located at "3430 15th Ave W, in the City of Seattle, King County, Washington" (the "PSA"). (CP 8). Neither the seller, nor the buyer, nor the property address exist. (CP 295). Notably, the Respondent is

not “Loft Haus – Terrace 15 LLC” but rather a completely different entity.

The PSA appears to have also been signed by Joshua Fletcher and Camila Fletcher, members of Terrace15, LLC (“Respondent.”) A third individual also signed the agreement. Mr. Kim, one of the Petitioners, is adamant that he did not sign the PSA, and that he had no knowledge about the transaction. Respondent can point to no direct communication between itself and Petitioners regarding the transaction, nor does it provide evidence that Petitioners had knowledge concerning the transaction. (CP 366).

Prior to the PSA being executed by both parties, “seller’s” real estate agent was aware that “SYS Inc” did not exist. (CP 318). Despite this understanding, the seller did not request that buyer’s obligations under the PSA be guaranteed by an individual. Instead, the “seller” simply executed the PSA. Around the same time, the buyer also executed a

Promissory Note for the earnest money. (CP 320). The Promissory Note again reflects the "buyer," "seller," and address listed above; the note was not personally guaranteed.

On or around August 10, 2018, the "buyer" and "seller" executed an addendum whereby the buyer confirmed it had completed its due diligence and that it would deposit earnest money by August 13, 2018. (CP 322). The day after the agreed deadline to deposit the earnest money, the parties executed an extension and increased the earnest money to $100,000. (CP 324). The "seller" was shortened to "Loft Haus," but the property address and the "buyer" remained the same. Concurrently with the extension, a new promissory note was executed. The promissory note was again made by "SYS Inc." without the addition of a personal guaranty. (CP 325).

Despite this, on April 15, 2020, Respondent obtained a summary judgment ruling against Petitioners on the basis that Petitioner are personally liable as a promoter of the non-existent

buyer. Regardless of whether Petitioners filed a response, Respondents failed to establish that there is no issue of material fact such that summary judgment should be granted.

Additionally, before the summary judgment decision, which was ruled upon without oral argument, on April 8, 2020, and April 9, 2020, two declarations were filed by Susann Kim[1] *on behalf of* Petitioners contesting the requested relief. (CP 156; CP 171.) While it is true that Susann was a defaulted party at the time the declarations were filed, these declarations were not filed by her as a defaulting party, but rather were filed *for* Petitioners. For instance, on April 8, 2020, Susann wrote a letter to the trial court stating: "The SYS LLC Young Kim and I Susann Kim like to continue the hearing on April 30, 2020[.] Because myself and Mr. Maxwell was negotiated the settlement to release the case . . .Please see the attached documents and let

[1] Petitioner Yong Kim and Susann Kim are siblings. For clarity, Susann Kim is referred to by her first name. No disrespect is intended.

us have continue on hearing." (CP 165). That same day, Susann emailed the trial court stating: "Please review the attached documents *we* have sent to the court this afternoon. . . . As the documents shows Young Kim and the SYS LLC has not involved with this transaction." (CP 421) (emphasis added). In other words, Division I and the trial court were incorrect when they said "[Petitioners] did not file a response to Terrace15's motion for summary judgment." Op. at 5.

Finally, it is undisputed that Susann did not receive proper notice of the Motion for Summary Judgment. Based on the Notice of Hearing that was filed, the Motion for Summary Judgment was not mailed to Susann, and Respondent does not contest that it did not give notice to Susann. (CP 90.)

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Division I's Decision Fails to Recognize That the Late Filed Declarations Were Submitted on Behalf of a Non-defaulted Party, and Therefore the *Burnet* Factor Apply.

Division I found that *Keck v. Collins*, 184 Wn.2d 358, 368-69, 357 P.3d 1080 (2015) should not apply because the late filed declarations of Susann were filed by a defaulted party that is not entitled to respond. Op. at 6. This determination is wrong. While Petitioners do not dispute that Susann's declarations were filed *by* her, it is incorrect to state that they were filed *for* her. Rather, the declarations were filed for Petitioners, and the filing of the declarations was no different than a third-party legal messenger filing pleadings.

On April 8, 2020, Susann wrote a letter to the trial court stating: "The SYS LLC Young Kim and I Susann Kim like to continue the hearing on April 30, 2020[.] Because myself and Mr. Maxwell was negotiated the settlement to release the case . . . Please see the attached documents and let us have continue

on hearing." (CP 165). The same day, Susann emailed the trial court stating: "Please review the attached documents *we* have sent to the court this afternoon. . . . As the documents shows Young Kim and the SYS LLC has not involved with this transaction." (CP 421) (emphasis added). These communications makes it clear that Susann filed the two declaration *on behalf of* Petitioners. Even the Respondent, Terrace15, admits that Susann was filing the declaration on behalf of Petitioners. Appendix C [Resp. App. Br. at 5 ("In those documents, Ms. Susann W. Kim asserted that she represented both SYS LLC, herself and Mr. Yong Kim (A–000158)."] Respondent took a similar position before the trial court when it noted that "Ms. Susann Kim alleged that she had authority to communicate *on behalf SYS LLC, herself, and Mr. Yong Kim*," (CP 387), and argued that "Ms. Susann Kim is aware of the matter and has continued to file documents in this matter and has made correspondences to the court *as the*

alleged representative of SYS LLC and Mr. Yong Kim." (CP 391) (emphasis added).

It is clear from the record that, while Susann physically filed the supporting declarations, such declarations were functionally filed by Petitioners. As a result, *Keck v. Collins* is applicable, and the trial court must first consider the three *Burnet* factors on the record: whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). By not considering the *Burnet* factors, the trial court committed clear legal error by refusing to consider the late filed declarations. Division I's reliance on CR55(a)(2) is inapplicable because it is not a defaulted party that submitted the late response. Rather, a non-defaulted party submitted the late response that just so happened to be filed by a defaulted party. Susann's filing of the declarations is no

different than a party using a legal messenger to file its response. Therefore, Division 1 was wrong to disregard *Keck*. Review of this key issue is merited under RAP 13.4(b)(1).

B. The Trial Court and Division I Failed to Properly Consider Whether the Respondent Satisfied Its Burden on Summary Judgment.

Neither Division I nor the trial court address whether sufficient grounds existed to grant summary judgment. As this Court is aware, summary judgment can only be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

> Initially the burden is on the party moving for summary judgment to prove by uncontroverted facts that there is no genuine issue of material fact. *LaPlante v. State* [85 Wn.2d 154, 531 P.2d 299 (1975)] at 158 [531 P.2d 299]; *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962); 6 J. Moore, *Federal Practice* ¶ 56.07, ¶ 56.15[3] (2d ed. 1948). If the moving party does not sustain that burden,

> summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials. *Preston v. Duncan*, [55 Wn.2d 678, 681, 349 P.2d 605 (1960)] at 683 [349 P.2d 605], *see also* Trautman, *Motions for Summary Judgment: Their Use and Effect in Washingt*on, 45 Wash.L.Rev. 1, 15 (1970).

Jacobsen v. State, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977) (emphasis added); *accord*, *Zamora v. Mobil Oil Corp*., 104 Wn.2d 199, 208–09, 704 P.2d 584 (1985); *Graves v. P.J. Taggares Co*., 94 Wn.2d 298, 302, 616 P.2d 1223 (1980).

As the moving party, the Respondent failed to meet its burden "irrespective of whether "Appellants" ha[ve] submitted affidavits or other materials." *Jacobsen*, 89 Wn.2d at 108.

On or about July 20, 2018, a Commercial & Investment Real Estate Purchase & Sale Agreement was entered into by "Loft Haus – Terrace 15 LLC," as the seller, and "SYS Inc And/or Assigns" as the buyer, for the property located at "3430 15th Ave W, in the City of Seattle, King County, Washington" (the "PSA"). (CP 8). Neither the seller, nor the buyer, nor the

property address exist. (CP 295.) Neither the Petitioners nor the Respondent are parties to the PSA.

As was noted to Division I, 1) Respondent did not have standing to sue Petitioners as it is not a party to the contract and the contract is void, 2) it was improper for Respondent to rely on RCW 23B.02.040 to impute personal liability to Petitioners as Respondent was aware at the time of contracting that "SYS Inc" was not a legal entity, and 3) Respondent provided no legal authority for why a real estate agent may bind Petitioners to a contract where Petitioners had no direct communication (oral or written) with Respondent such that Respondent could argue the real estate agent had apparent authority to act on the Petitioners' behalf. (Br. at 18-22).

Respondent did not have standing to sue Petitioners as it is not a party to the contract. Standing is a "party's right to make a legal claim or seek judicial enforcement of a duty or right." *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610

(2007) (quoting BLACK'S LAW DICTIONARY 1442 (8th ed.2004)). CR 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest." The purpose of CR 17(a) is to protect a defendant from a subsequent action by the party actually entitled to recover and to expedite litigation by not permitting technical or narrow constructions to interfere with the merits of legitimate controversies. *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998).

Here, there can be no dispute that Respondent is not a party to the contract. Rather, it was entered into by "Loft Haus – Terrace 15, LLC." (CP 298.) Respondent and Respondent's agent were aware that the name was incorrect before the PSA was signed, but Respondent apparently chose not to correct it. (CP 358.)

The PSA also failed to properly identify the property being conveyed, failed to properly identify the seller, and even failed to identify a real entity to purchase the property. As such

the PSA is void for violation of the statute of frauds. In 1955 this Court outlined "[w]hat elements are essential to a simple, valid and binding contract for the sale of land in an action for damages for breach." *Hedges v. Hurd*, 47 Wn.2d 683, 686–87, 289 P.2d 706 (1955). This Court ruled that a valid contract should specify the total purchase price, the method of payment of principal and interest, provisions for prorating taxes, insurance and liens, payments of water and other utilities, provisions for possession, provision for the deposit in escrow of the balance of the down payment to purchasers, and a warranty deed by the seller. *Id.* It is also generally understood that the identity of the parties is an essential element. *See* 6A Powell & P. Rohan, Powell on Real Property ¶ 880[1][d] (rev. ed. 1990); *see also Wagers v. Associated Mortgage Inv'rs*, 19 Wn. App. 758, 764, 577 P.2d 622 (1978) (Noting an agreement for the sale of land must "establish the subject matter, consideration, identity of the parties and the terms of the agreement.")

Finally, "to comply with the statute of frauds, Washington strictly requires a legal description of the property that an agreement purports to convey." *Geonerco, Inc. v. Grand Ridge Properties IV LLC*, 146 Wn. App. 459, 468, 191 P.3d 76 (2008).

Applied here, the PSA was entered into by "Loft Haus – Terrace 15, LLC," as the seller, and "SYS, Inc.," as the buyer, for the property located at "3430 15th Ave W, in the City of Seattle, King County, Washington". "Loft Haus – Terrace 15, LLC" does not exist and does not own the property located at "3430 15th Ave W, in the City of Seattle, King County, Washington".

Further, the address identified in the PSA also does not seem to exist. Despite the PSA referencing a legal description "Exhibit A", no legal description was provided. Given the lack of the legal description, lack of identification of the parties, and the improper address for the property, the PSA violates the

statute of frauds and is void. While it true that the statute of frauds may be satisfied by an agreement of the parties to have an agent insert a legal description, there is no evidence the legal description was ever inputted, and the legal description for "3430 15th Ave W" would clearly not be for property owned by Loft Haus - Terrace15, LLC as that property address does not exist. *Geonerco, Inc.*, 146 Wn. App. at 468.

Respondent's reliance on RCW 23B.02.040 to establish personal liability of Petitioners is also without merit. In its Motion for Summary Judgment, Respondent argued that Petitioners should be personally liable for the acts of SYS, Inc. as the company does not exist. RCW 23B.02.040 states that "[a]ll persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this title, are jointly and severally liable for liabilities created while so acting *except for any liability to any person who also knew that there was no incorporation*." (emphasis added.) There is no dispute that

prior to "Loft Haus – Terrace 15, LLC" entering into the PSA, Respondent was aware that SYS, Inc. did not exist. (CP 318; CP 358). The "seller" could have requested a personal guaranty, but chose not to. Instead, "seller" decided to "roll the dice." (CP 361). Respondent is unable to identify any direct "acts" made by Petitioners.

Respondent cannot argue that Petitioners should be liable when it was fully aware that SYS, Inc. did not exist and agreed to continue with the transaction anyway.

Respondent also provided no authority for why statements made by a real estate agent may bind Petitioners. "An agent can bind its principal to a contract when the agent has either actual or apparent authority. The existence of apparent authority is a question of fact for the trial court." *Hoglund v. Meeks*, 139 Wn. App. 854, 866, 170 P.3d 37 (2007) (citing *Smith v. Hansen*, 63 Wn. App. 355, 363, 818 P.2d 1127 (1991), review denied, 118 Wn.2d 1023, 827 P.2d 1392

(1992).) Apparent authority can be based "only on the principal's actions toward a third party and not based solely on the agent's actions." *Id.*

Petitioners had no direct communication (oral or written) with Respondent such that Respondent could argue the real estate agent had apparent authority to act on Petitioners' behalf. Because Respondent cannot even demonstrate that Petitioners had knowledge of this transaction, Respondent cannot show that Petitioners should be liable under a principal/agent theory and the summary judgment order should be vacated. Division I erred by not considering any of this. Divisions I's decision is entirely silent as to the merits of the summary judgment motion with the exception of "The trial court properly granted summary judgment for Terrace15." Op. at 7. Review is merited. RAP 13.4(b)(1), (2).

C. Division I Improperly Held That Petitioners Lacked Standing to Challenge Entry of a Default Judgment Against a Co-Defendant, Which Should Be Vacated.

Quoting *Forbes v. Pierce County*, 5 Wn. App. 2d 423, 433, 427 P.3d 675 (2018) Division I held that "the validity of the judgment against Susann is not Yong's issue to appeal. 'A litigant cannot assert the legal rights of another person.' ". Op. at 4. This analysis is incorrect and simplistic.

It well settled that Petitioners have standing to challenge the entry of the default judgment against Susann. *See In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1256 n.32 (7th Cir. 1980) (allowing defendants, which were subsidiaries of defaulting parties, to challenge a default judgment as the non-defaulting defendants would be adversely affected by the default judgment and faced potential economic harm); *United States v. Harvey*, No. CIV. 13-4023-KES, 2014 WL 2455533, at *4 (D.S.D. June 2, 2014) (finding that non-defaulting individual defendant as the owner and alter ego of the defaulting corporation could challenge the entry of default); *Diamond Servs. Corp. v. Oceanografia SA de CV*, No. 10-0177,

2013 WL 312368, at *3 (W.D.La. Jan. 24, 2013) (finding that because the defendants were part of a single business enterprise, a non-defaulting co-defendant may challenge an entry of default against defaulting defendant). Because Washington's CR 55 is similar to the federal rule, federal case law is instructive. *Gillett v. Conner*, 132 Wn. App. 818, 824, 133 P.3d 960, 962 (2006) ("When the language of a Washington rule and its federal counterpart are the same, courts look to decisions interpreting the federal rule for guidance.")

The United States Supreme Court has held that, as a general rule, judgment should not be individually entered against one defendant where other defendants are alleged to be jointly liable. *Frow v. De La Vega*, 82 U.S. 552 (1872) ("A final decree on the merits cannot be made separately against one of several defendants upon a joint charge against all, where the case is still pending as to the others.") The reason is:

> [T]here might be one decree of the court sustaining the charge of joint fraud committed by the

> defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill.… Such a state of things is unseemly and absurd, as well as unauthorized by law.

Id. at 554. *See also In re First T.D. & Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001) ("It follows that if an action against the answering defendants is decided in their favor, then the action should be dismissed against both answering and defaulting defendants.")

Here, the claims are inextricably intertwined such that judgment should not be rendered solely against Petitioners. Petitioners previously filed a Motion for Default against Susann asserting that Petitioners "had no knowledge of [the transaction] until the dispute rose well after the contract allegedly formed." (CP 59-60.) The court specifically found:

> as a result of Cross-Claim Defendant Susann Kim's fraud that she acted as if she had been a rightful agent or representative of Cross-Claimant Yong S. Kim's company, Cross-Claim Defendants are indebted to Cross-Claimants

(CP 75.) The trial court's order has not been challenged by Respondent, and is now a verity on appeal. *Metropolitan Park Dist. v. Griffith*, 106 Wn.2d 425, 433, 723 P.2d 1093 (1986) ("An unchallenged finding of fact is a verity on appeal.") Allowing a judgment against Petitioners would create the absurd situation where (1) the trial court has found Susann defrauded Petitioners and they were not involved in the PSA transaction and (2) Petitioners participated in the PSA transaction and are liable to Respondent. Both cannot be true. Entering two such orders is obvious error by the trial court, and Division I gave this issue no consideration.

Review of this key issue is merited under RAP 13.4(b)(1), (2).

VI. CONCLUSION

Division I's opinion is unjust and fails to properly consider binding precedent from this Court. Division I's analysis of Keck is incorrect because it failed to recognize that

Petitioners were ultimately the party submitting late-filed declarations. Additionally, Division I failed to consider, in any respect, whether Respondents met its burden on summary judgment.

This Court should grant review and reverse the trial court's summary judgment in favor of Respondent. Fees and costs should be awarded to Petitioners.

I certify that this memorandum contains 3,683 words, in compliance with RAP 18.17.

RESPECTFULLY SUBMITTED this 27th day of May, 2022.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By */s/ Christopher W. Pirnke*
Christopher W. Pirnke, W.S.B.A. #44378
Attorneys for Petitioners

10900 NE 4th Street, Suite 1500
P.O. Box 90016
Bellevue, Washington 98009-9016
Telephone: (425) 455-1234
Facsimile: (425) 635-7720

APPENDIX TABLE OF CONTENTS

APPENDIX A

FILED
3/14/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERRACE15, LLC, a Washington limited liability company,

Respondent,

v.

SYS INC.; SUSANN W. KIM and JOHN DOE KIM, individually and the marital community thereof; and JOHN and JANE DOES 1-10,

Defendants,

MR. YONG S. KIM and JANE DOE KIM, and the marital community thereof,

Appellants.

No. 82405-8-I
(consolidated with no. 81448-6-I)

DIVISION ONE

UNPUBLISHED OPINION

APPELWICK, J. — The trial court granted summary judgment for Terrace15 on a breach of contract claim after Yong failed to respond to the motion. Yong moved to vacate the summary judgment based on excusable neglect. He also attempted to vacate the default issued against his sister who was an additional defendant in the suit. The court denied his requests. We affirm.

FACTS

Terrace15 LLC filed a complaint for breach of contract against Yong Kim and Susann Kim in December 2018. Terrace15 sought payment of $100,000

earnest money after a failed commercial purchase and sale agreement. Yong[1] filed an answer as well as affirmative defenses and cross-claims against Susann. Susann did not appear.

In February 2019, Terrace15 moved for an order of default against Susann. The trial court granted the motion and entered an order of default against Susann. Susann never appealed or moved to vacate the default against her.

Yong's attorney withdrew from representation in May 2019.

On August 13, 2019, Terrace15 moved for summary judgment with the hearing noted for September 13, 2019. Yong did not file a response to the motion. Instead, Yong's new attorney filed a motion to continue on September 11, 2019. The court granted the continuance "provided Defendant shall make greater effort to comply with the court schedule." The court also imposed $10,000 in terms against Yong payable to Terrace15.

In November 2019, Yong moved for an order of default against Susann because she failed to appear on his cross-claim. The trial court granted the motion and entered an order of default against Susann in December 2019. The court concluded, inter alia, that "as a result of Cross-Claim Defendant Susann Kim's fraud that she acted as if she had been a rightful agent or representative" for Yong's company, Susann was liable to Yong for all damages proximately caused by her fraudulent actions. Yong's second attorney withdrew soon after.

[1] Yong Kim and Susann Kim are siblings. For clarity we refer to the defendants by their first names. We mean no disrespect.

On March 6, 2020, Terrace15 again moved for summary judgment on the breach of contract with a hearing noted for April 10, 2020. Yong did not file a response. But, Susann attempted to file documents with the court on April 9, 2020. The filing included a declaration claiming that Yong was not involved in the purchase and sale agreement and was unfairly "pulled into this lawsuit without having any prior knowledge on the even [sic] existence of the disputed transaction."

Upon consideration of Terrace15's motion for summary judgment, the trial court noted that Yong had failed to submit a response and that Susann had attempted to submit untimely documents that did not comply with the requirements of court rules CR 5, CR 7, and CR 11. The court concluded that due to the orders of default against her, Susann did not have standing in the matter and declined to consider her untimely submissions. The trial court granted summary judgment against Yong and determined that Yong and Susann were jointly and severally liable for the earnest money, prejudgment interest, and attorney fees and costs. The court entered judgment for Terrace15 in the amount of $133,781.09.

Yong secured new counsel in early May 2020. Yong filed a motion for discretionary review with this court. In September 2020, Yong requested leave to file a motion to vacate the judgment in the superior court. A commissioner of this court issued a stay pending the trial court's consideration of Yong's motion to vacate the judgment.

Yong filed a CR 60(b) motion to vacate the summary judgment and judgment against him. The trial court conducted a hearing on the motion to vacate. Yong appeared represented by counsel and Susann appeared pro se. The trial court noted that Susann did not have any right to argue before the court because she had not submitted a written pleading and had been defaulted in the case. Yong claimed that the order of default was improperly entered against Susann because she had appeared informally and had been entitled to notice of the motion for default. He also argued for vacation of the summary judgment based on excusable neglect. According to Yong, Susann had agreed to "handle" the issues pertaining to the lawsuit. The trial court denied the motion to vacate the summary judgment and awarded Terrace15 additional attorney fees and costs. The court stated, "[T]his is just gamesmanship. That's all I see this as. It's a way to manipulate and delay, obfuscate the record, confuse the Court of Appeals. Enough."

Yong filed a notice of appeal which was consolidated with the motion for discretionary review.

DISCUSSION

I. Default Judgment

Yong argues the trial court lacked jurisdiction to enter a default judgment against Susann because more than one year had passed since the service of the summons and complaint. But, the validity of the judgment against Susann is not Yong's issue to appeal. "A litigant cannot assert the legal rights of another person." Forbes v. Pierce County, 5 Wn. App. 2d 423, 433, 427 P.3d 675 (2018). Only Susann may exercise the right to appellate review of the judgment against her.

Susann did not seek review of the decision. Therefore, we will not address the merits of this issue.

II. Summary Judgment

Yong claims the trial court erred by granting summary judgment for Terrace15 because there are existing factual issues.[2] Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). To defeat summary judgment, the opposing party must set forth specific facts showing a genuine issue of material fact. Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc., 114 Wn. App. 151, 157, 52 P.3d 30 (2002). We review orders on summary judgment de novo. Kim v. Lakeside Adult Family Home, 185 Wn.2d 532, 547, 374 P.3d 121 (2016).

Yong did not file a response to Terrace15's motion for summary judgment. As a result, Yong failed to set forth specific facts or issues of law to defeat summary judgment. Terrace15 was entitled to judgment as a matter of law.

Yong argues that Susann submitted declarations in response to the summary judgment and the trial court erred by refusing to consider the evidence. "A trial court's decision to admit or exclude evidence lies within its sound discretion." Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App.

[2] Additionally, Yong argues that vacation of the summary judgment order against Susann necessarily requires vacation as to him. Because we do not address the merits or vacate the judgment against Susann, we also decline to vacate the judgment against Yong on this ground.

736, 744, 87 P.3d 774 (2004). We will not overturn the trial court's evidentiary rulings absent a manifest abuse of discretion. Id.

According to Yong, the trial court failed to examine the Burnet[3] factors in determining whether to exclude the evidence. Yong cites to Keck v. Collins, 184 Wn.2d 358, 368-69, 357 P.3d 1080 (2015), in support of the claim that the court should have applied the Burnet factors. In Keck, a plaintiff seeking damages for medical malpractice submitted an untimely affidavit from a medical expert in an attempt to ward off summary judgment. Keck, 184 Wn.2d at 366. The trial court declined to consider the evidence and granted summary judgment for defendants. Id. 366-67. The Washington Supreme Court reversed, determining that a trial court should consider the Burnet factors when excluding untimely evidence submitted in response to a summary judgment motion. Id. at 369.

This case differs significantly from Keck. Susann was not an opposing party to the motion for summary judgment. As noted by the trial court, Susann was a defaulted party with orders of default entered against her by both Terrace15 and Yong. As a defaulted party who had failed to appear, Susann "may not respond to the pleading nor otherwise defend without leave of court." CR 55(a)(2). Susann neither requested nor received leave to file the untimely documents. Susann was not entitled to participate in the summary judgment proceedings. The trial court

[3] Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Before excluding evidence that would affect a party's ability to present its case, a trial court must consider the three Burnet factors: whether a lesser sanction would suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudice the opposing party. Keck v, Collins, 184 Wn.2d 358, 368-69, 357 P.3d 1080 (2015).

did not abuse its discretion by excluding Susann's evidence without considering the Burnet factors.

The trial court properly granted summary judgment for Terrace15.

III. Motion to Vacate

Yong contends the trial court improperly denied his CR 60(b)(1) motion to vacate the summary judgment. A decision on a CR 60(b) motion is in the court's discretion and will not be reversed without a showing of abuse of discretion. In re Vulnerable Adult Pet. for Winter, 12 Wn. App. 2d 815, 829, 460 P.3d 667, review denied, 196 Wn.2d 1025, 476 P.2d 565 (2020). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Id. This includes when "the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." Gildon v. Simon Prop. Grp., Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

Under CR 60(b)(1), "On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment" for reasons including "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." Yong bases the motion to vacate on excusable neglect. He claims he did not understand the legal documents because English is not his native language, he thought the courts were shut down due to COVID-19, and he thought Susann was handling the matter.

The trial court concluded that Yong's actions were neglect rather than excusable neglect. The court noted, "He doesn't deny that he received the documents." The court further stated,

> [H]e simply failed to respond to the motion for summary judgment, and there just isn't any evidence whatsoever for his excusable neglect for filing any response to the summary judgment.
>
> He was aware of it, so was the sister or why would we be getting these 11th hour declarations. And you can't just pick and choose which deadlines you want to abide by or what is the point of having deadlines.

And, the court recognized that this was the second motion for summary judgment Yong had failed to answer: "He doesn't deny that he's been through this not once but twice. This happened back in September of 2019 and terms were awarded" and a continuance granted. This fact undercuts any claim that Yong did not understand the import of the motion or the potential consequences. The fact that the papers served on him set a hearing date was adequate notice that the courts were not shut down for COVID-19 as he claimed. Yong explains no basis for relying on Susann, who was an adverse party against whom he had taken a default, to act on his behalf. It is wholly understandable that the trial court expressed the strong opinion that the failure to respond to the summary judgment motion was not excusable.

The trial court did not abuse its discretion in denying the motion to vacate.

IV. Attorney Fees on Appeal

Terrace15 concludes its briefing with the statement "[a]dditional fees and costs should be awarded to Respondent." Terrace15 does not devote a section of its briefing to the request as required by RAP 18.1(b). "The rule requires more

than a bald request for attorney fees on appeal." Stiles v. Kearney, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). Argument and citation to authority that is the basis for the request is mandatory. Id. Because Terrace15 failed to satisfy these requirements, we decline to award fees on appeal.

We affirm.

Appelwick, J.

WE CONCUR:

Bowman, J.

Mann, C.J.

APPENDIX B

FILED
4/27/2022
Court of Appeals
Division I
State of Washington

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

TERRACE15, LLC, a Washington limited liability company,

Respondent,

v.

SYS INC.; SUSANN W. KIM and JOHN DOE KIM, individually and the marital community thereof; and JOHN AND JANE DOES 1-10,

Defendants,

MR. YONG S. KIM and JANE DOE KIM, and the marital community thereof,

Appellants.

No. 82405-8-I
(consolidated with no. 81448-6-I)

ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, Yong Kim and Jane Doe Kim, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, J.P.T.
Judge

APPENDIX C

No. 82405-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

Mr. Yong S. Kim and Jane Doe Kim, individually and the marital community thereof,

Appellant,
v.
Terrace15, LLC, A Washington Limited Liability Company,

Respondent.

BRIEF OF RESPONDENT

Holmquist & Gardiner PLLC
Robert Maxwell, WSBA #46636
Attorney for Respondent

HOLMQUIST + GARDINER, PLLC
1000 Second Ave, Suite 1770
Seattle, Washington 98104
p: 206-438-9083 f: 206-694-4601

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

I. INTRODUCTION

This dispute concerns recovery of earnest money due to a breach of contract from a purchase and sale agreement for real property to be sold by Respondent to Appellants. After agreeing to terms, the purchase and sales agreement entered escrow with Chicago Title for closing. After Respondent provided a third extension to Buyers to close, the Buyers failed to close by the agreed upon closing date and materially breached the contract. Respondent Terrace15 initiated a lawsuit against the buyers at the end of 2018 to enforce the terms of the purchase and sale agreement and recover earnest money to which Respondent was granted at summary judgment.

Mr. Yong Kim is represented by his third attorney in this matter, has ignored multiple court filings, deadlines, and procedures, failed to respond to the motion for summary judgment (to which Appellant was already previously sanctioned for), delayed proceedings for months, and now requests the Court of Appeals to overturn the trial court's decisions in this matter. This matter has been before the lower court for almost three years due to Mr. Yong Kim's tactics and delays.

Respondent Terrace15, LLC respectfully requests this court to find the trial court did not err when it: (1) Refused to consider untimely filed

documents by Ms. Susann W. Kim, a defaulted party in the case; (2) Granted Respondent's Motion for Summary Judgment when Mr. Yong Kim failed to file a response and raise a genuine issue of material fact; and (3) Denied Mr. Yong Kim's Motion to Vacate because he failed to prove excusable neglect.

For efficiency and to avoid duplication, references and citations are made to Appellant's documents designated as Clerk's Papers in the Index to Clerk's Papers Volume 1 & Volume 2. Respondent's supplemental documentation for designation by the clerk begins at CP 440.

II. STATEMENT OF THE CASE

A. Background Facts.

This matter concerns a Commercial & Investment Real Estate Purchase & Sale Agreement ("**PSA**") between "SYS Inc and/or assigns" as the "**Buyers**" and "Loft Haus- Terrace15 LLC" as the seller ("**Respondent**"), for real property located at 3430 15th Avenue West in Seattle, Washington ("**Property**"). (CP 8). After Buyers repeatedly failed to adhere to the terms of the PSA, the Respondent initiated a lawsuit to enforce the terms of the PSA and recover earnest money of $100,000.00 to which Respondent was granted at summary judgment. (CP 258-261).

Buyers listed 12625 Woodinville Dr. SE, Woodinville, WA, as their contact information in the PSA. (CP 18). This address relates to SYS LLC (UBI#603 009 224), which lists Mr. Yong Kim as the current governor. During negotiations, Ms. Susann W. Kim's real estate agent, Ms. Ellen Bruya, affirmatively represented that both Susann W. Kim and Yong Kim actively participated in the drafting and signing the PSA that was presented to Terrace15. (CP 153-155, CP 151:17-18, CP 91-113). Respondent's real estate broker, Jerrid Anderson, rejected multiple other offers and chose Buyers based on the appearance of being a strong and secure buyer due to projects developed by Mr. Yong Kim and assets owned. (CP 151:23 – 152:2). Mr. Yong Kim and Ms. Susann W. Kim are siblings, have worked with each other in prior real estate transactions, and were both served with the summons and complaint.

Respondent Terrace15 gave Buyers multiple opportunities to make good on their contractual obligations. Buyers executed an Earnest Money Promissory Note on CBA Form EMN concerning $50,000.00 on July 20, 2018. (CP 22). On August 10, 2018, Buyers gave Respondents notice of satisfaction of feasibility and agreed to deposit the $50,000.00 in earnest money ("**Earnest Money**") to escrow on Monday, August 13, 2018. (CP

28). Buyers failed to deposit the Earnest Money and on August 14, 2018, Respondent and Buyers entered a second amendment granting Buyers additional time to deposit the Earnest Money. Under the second amendment, the Buyers had until Friday, August 17, 2018, to deposit the Earnest Money and the Earnest Money was increased to $100,000.00 along with a new closing of August 29, 2018, or sooner. (CP 30). Buyers failed to deposit the Earnest Money as required and close by August 29, 2018. On September 18, 2018, the parties mutually agreed to continue the transaction if the $100,000.00 Earnest Money was provided and unconditionally released to Respondent by September 20, 2018, and the transaction closed on or before September 30, 2018, memorialized in a third amendment to the PSA. (CP 33). Buyers failed to close on or before September 30, 2018, and sellers initiated this lawsuit to recover earnest money of $100,000.00. (CP 1-35).

B. Procedural History.

This matter was filed with the Superior Court of King County on December 11, 2018, with a trial date of December 9, 2019. (CP 1-35). Less than two months later, Mr. Yong Kim filed an Answer and Affirmative Defenses and Cross Claim on February 1, 2019. (CP 36-43). To date, Mr.

Yong Kim has seen three different attorneys of record: (1) Mr. Yong Kim's first attorney, Young J. Han, assisted with filing Appellant's Answer and withdrew on June 5, 2019 (CP 440-442); (2) Mr. Yong Kim's second attorney, Oscar Y. Yang, appeared on September 10, 2019, right before Respondent's first Motion for Summary Judgment requesting a continuance, but then withdrew four months later (CP 448-449); and (3) Mr. Yong Kim's third and current attorney, Christopher W. Prince, appeared on May 7, 2020.

After service of the summons and complaint in this matter, Ms. Susann W. Kim failed to appear, and a Default Order was entered against her on February 21, 2019. (CP 50-51). Respondent noted the motion for summary judgment on May 17, 2019, and soon after Mr. Yong Kim's then attorney withdrew (CP 440-442). In August of 2019, Respondent Terrace15 moved and served an initial summary judgment motion set for September 13, 2019. On September 6, 2019, Respondent notified the Court that Mr. Yong Kim had not responded to Respondent's motion and asked for relief as requested. (CP 443-445). On the eve of the hearing date, a new attorney appeared on behalf of Mr. Yong Kim and requested a continuance. The continuance was granted and terms against Mr. Yong Kim was entered for

his failure to follow court deadlines and procedures. (CP 446-447).

On January 21, 2020, Mr. Yong Kim's second attorney entered his notice of intent to withdrawal. (CP 448-449). On March 6, 2020, Respondent re-noted and filed a second motion for summary judgment to be heard on April 10, 2020. Despite being sanctioned previously and being aware of court deadlines, Mr. Yong Kim once again did not file any response within the timeframes dictated by CR 56. However, Defendant Ms. Susann W. Kim appeared and attempted to file documents on April 8 and 9, 2020, with the Court. (CP 156-165; CP 171-249). In those documents, Ms. Susann W. Kim asserted that she represented both SYS LLC, herself, and Mr. Yong Kim. (CP 165). No motion for a continuance was requested under CR 56(f) and there were no filings made by Appellant Mr. Yong Kim in response to or opposing the Respondent's Motion for Summary Judgment. (CP 255:2-3). The trial court exercised its discretion and refused to consider untimely documents from Ms. Susann W. Kim. (CP 255:3-13). The trial court granted the summary judgment motion on April 15, 2020. (CP 254-257).

Respondent moved the trial court for entry of judgement, fees, and costs on April 28, 2020. On May 7, 2020, Appellant Mr. Yong Kim's third

and current attorney appeared and filed a response to the motion to enter judgment on May 11, 2020. Appellant's counsel only asserted arguments concerning the fees requested. The court entered the Order in favor of Respondent on May 13, 2020. (CP 258-261). Mr. Yong Kim did not motion for reconsideration, did not assert defenses nor move for a motion to vacate the summary judgment until eight (8) months later.

On May 14, 2020, Mr. Yong Kim filed a Notice of Discretionary Review with the Court of Appeals. Following the Notice of Discretionary Review, Mr. Yong Kim missed the deadlines for filing his motion for discretionary review and requested eight (8) months of extensions to file his Motion for Discretionary Review. After requesting the Court of Appeal to stay the appeal process so that the trial court could hear his Motion to Vacate, on January 15, 2021, the trial court heard Appellant's Motion to Vacate which was "emphatically" denied at the hearing. (RP 1-29; RP 27:23-24; CP 436-437). At oral argument for that hearing, Ms. Susann W. Kim appeared, did not submit any documents, and did not make any arguments before voluntarily requesting to be removed from the hearing. (RP 8:8-16).

In Mr. Yong Kim's declarations filed in support of his Motion to

Vacate, he states that he received the documents for Respondent's Summary Judgment and asked his sister (Defendant Ms. Susann W. Kim) to handle the matter, stating that he was relying on her to "reach an agreement and that there was nothing I had to do" and that he "incorrectly assumed that the court was on hold, and that my sister had it under control" (CP 366:5-7; CP 367:6-7). Mr. Yong Kim asserts that his sister defrauded him and had no representative capacity while also admitting that he put her in control of handling his case relating to this matter. This contradiction was noted by the trial court at oral argument on the Motion to Vacate. (RP 28:3- RP 29:2).

In the oral ruling the trial court was critical of the gamesmanship being played and the "mockery of the procedural requirements and the deadlines". (RP 27:6-7). The trial court was also critical of Mr. Yong Kim's delays, manipulation and attempts to obfuscate the record for the Court of Appeals. (RP 25-29). The trial court acted within its discretion in denying Appellant's Motion to Vacate, award supplemental attorney fees and costs to the judgment on February 9, 2021. (CP 438-439).

III. ARGUMENT AND LEGAL AUTHORITY

A. <u>The Standard of Review for a Trial Court's Grant of Summary Judgment is Subject to an Abuse of Discretion.</u>

The appellate court reviews a trial court's decision whether to vacate a judgment under CR 60 for an abuse of discretion. Shaw v. City of Des Moines, 109 Wn. App. 896, 900, 37 P.3d 1255 (2002). The trial court decision will not be overturned unless the trial court exercised its discretion on untenable grounds or for untenable reasons. Shaw, 109 Wn. App. at 901. A court abuses its discretion if its decision to deny a CR 60(b) motion is manifestly unreasonable or based on untenable grounds. Showalter v. Wild Oats, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). The appellate court will only overturn the superior court's decision if the decision "'rests on facts unsupported in the record or was reached by applying the wrong legal standard,'" or if the superior court applied the correct legal standard, but "adopt[ed] a view 'that no reasonable person would take.'" Mitchell v. Wash. State Inst. of Pub. Policy, 153 Wn. App. 803, 822, 225 P.3d 280 (2009) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)), review denied, 169 Wn.2d 1012 (2010).

As the trial court noted in the Motion to Vacate hearing, "this is just gamesmanship. That's all I see this as. It's a way to manipulate and delay, obfuscate the record, confuse the Court of Appeals." (RP 24:14-16). The conduct of Mr. Yong Kim was so egregious and of a repeating nature that

the trial court reviewed the issues and refused to consider the late filed declarations by Ms. Susan W. Kim to put an end to the repeated mockery of the court deadlines. This is within the trial court discretions to refuse untimely and improper material that would only serve to promote the continuing pattern of abuse of the court procedures. The trial court properly denied Appellant's motion to vacate, and Appellant is now before the Court of Appeals requesting this court to look past his inexcusable neglect and promote his pattern of procedural abuses.

The premise of Mr. Yong Kim's appeal rests on the argument that the judgment against his sister, Ms. Susann W. Kim, should be vacated (which it should not be and further has never been motioned for by Ms. Susann W. Kim) and that his judgment should in turn be vacated. This argument is inherently flawed, based on conjecture and would only serve to promote abuses and gamesmanship within the court. Vacating Ms. Susann W. Kim's judgment does nothing to correct Appellant's inexcusable neglect, gamesmanship, and delay tactics.

B. The Trial Court had Jurisdiction to Enter Judgment Against Ms. Susann W. Kim Because She was Notified of Respondent's Motion for Summary Judgment by Appellant

Mr. Yong Kim.

After a party has been adjudged to be in default by an order of default, it cannot contest the subsequent proceedings, and is not entitled to further notice thereof. *See* Pedersen v. Klinkert, 56 Wn.2d 313, 320, 352 P.2d 1025 (1960). First, Respondent's motion was brought under CR 56 and not CR 55; Appellant's reliance on CR 55(f) is not applicable. Mr. Yong Kim's authority is inapplicable because it concerns default judgments, not summary judgments. *See* Oglesbee v. Andersen, No. 38408-2-I, 1997 Wash. App. LEXIS 401, at *6 (Ct. App. Mar. 24, 1997) citing Storey v. Shane, 62 Wash. 2d 640, 643, 384 P.2d 379 (1963) ("The court's order granting summary judgment is not a default judgment. Rather, it was a summary judgment which is a judgment on the merits in the nature of a judgment after a trial"). Second, Mr. Yong Kim's declaration submitted in support of his unsuccessful motion to vacate concede that Ms. Susann W. Kim had notice of the time and filings relating to the Respondent's Summary Judgment Motion. (CP 366:5). This is confirmed through Ms. Susann W. Kim's appearance, untimely filings, and interactions with the trial court prior to the April 10, 2020, Motion for Summary Judgment.

CR 55(f)(1) states:

> Notice. When more than 1 year has elapsed after service of summons *with no appearance being made*, the court shall not sign an order of default or enter a judgment until a notice of the time and place of the application for the order or judgment is served on the party in default, not less than 10 days prior to the entry. Proof by affidavit of the service of the notice shall be filed before entry of the judgment. [*Emphasis Added*]

Further, appellate courts review de novo questions of law, including questions of adequacy of notice, constitutional law, and whether, on undisputed facts, appearance has been established as a matter of law. *See* Dep't of Ecology v. Campbell & Gwinn, *LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In Morin v. Burris, 160 Wn.2d 745, 749-50, 161 P.3d 956 (2007), the court ruled that, for purposes of satisfying CR 55's notice requirement, a party need not appear formally by, for instance, filing an answer, but it must appear in court in some way. Rosander v. Nightrunners Transp., Ltd., 147 Wn. App. 392, 399, 196 P.3d 711, 715, (2008) Wash. App. LEXIS 2683, *6.

Here, the undisputed facts demonstrate that Ms. Susann W. Kim had notice of Respondent's Summary Judgment Motion. Appellant Mr. Yong Kim submits a declaration under oath that he notified his sister when he received the Motion for Summary Judgment. (CP 366:5). This is confirmed through Ms. Susann W. Kim's email communications with the trial court,

requesting that the hearing be continued from April 10, 2020, to April 30, 2020. (CP 165; CP 245). Ms. Susann W. Kim also filed documents on the eve of the Motion for Summary Judgment. (CP 156-165; CP 171-245). Ms. Susann W. Kim had made an appearance prior to the Motion for Summary Judgment, with knowledge of the same, and never moved to vacate her default. In this case, Ms. Susann W. Kim was not prejudiced for lack of notice as evidenced by her actions with the court. The entry of judgment against Ms. Susann W. Kim was proper and she has never disputed the same even after knowledge of Respondent's Motion for Summary Judgment *and at* Appellant's Motion to Vacate. (RP 8:8-16).

C. Mr. Yong Kim's Judgment Should Not be Vacated Under Frow Because Mr. Yong Kim has a Default Judgment Against Ms. Susann Kim and the Parties are Jointly and Severally Liable in This Matter.

Appellant Mr. Yong Kim relies on Frow v. De La Vega, 82 U.S. 552, 554, 21 L. Ed. 60 (1872) to argue that if Ms. Susann Kim's judgment is vacated, his judgment should be vacated as well. This argument is incorrect and misguided. First, Ms. Susann W. Kim has *never* moved the court to vacate her judgment or opposed the matter; a valid final judgment on the merits exists against Ms. Susann W. Kim and Appellant. (*See* Storey

v. Shane, 62 Wash. 2d 640, 643, 384 P.2d 379 (1963). Second, the present case is distinguishable as it involves issues of joint and several liability whereas Frow involves only joint liability. Here, the entry of judgment against one but not all defendants is not precluded. (*See* Sompo Japan Ins. Co. of Am. v. Network FOB, Inc., No. CV 13-02851 RSWL (JCGx), 2013 U.S. Dist. LEXIS 198653, at *6 (C.D. Cal. Nov. 6, 2013) citing In Re Uranium Antitrust Litigation, 617 F.2d 1248, 1256-58 (7th. Cir. 1980) (holding that Frow does not apply to defendants alleged to be jointly and severally liable). Further, CR 54(b) allows for the entry of judgment against less than all defendants. Appellant's argument is based on conjecture that Ms. Susann W. Kim's judgment may be overturned without her moving for the same nor presenting a defense or opposition to the claims made.

Mr. Yong Kim lacks standing to challenge the entry of default judgment against Ms. Susann W. Kim. "To have standing, a party must show a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted." Primark, Inc. v. Burien Gardens Assocs. (In re County. Rd., 63 Wn. App. 900, 907, 823 P.2d 1116, 1117 (1992). Mr. Yong Kim is

unable to show a benefit or a real interest that would accrue by vacating a judgment against a responsible party that has failed to defend and, through their own statements, does not have any meritorious defense. (CP 171-175). Mr. Yong Kim's argument is inherently flawed. It would be a self-inflicted wound to remove his recourse against his sister. As noted by the trial court in the oral ruling for the Motion to Vacate, Appellant's counsel is in a precarious position while attempting to bring a motion to vacate on behalf of Ms. Susann W. Kim, a co-defendant in which they have a default order and judgment against. (RP 25-29).

Appellant cites to Bergren v. Adams County, 8 Wn. App. 853, 858 509 P.2d 661 (1973) for standing. Bergren does not address standing for a defaulted co-Defendant and is not applicable. Further, the citation to In re Uranium Antitrust Litig., 617 F.2d 1248, 1256 n.32 (7th Cir. 1980) is equally as unpersuasive and actually confirms that Frow does not preclude entry of a default judgment against more than one, but less than all of the defendants when liability is joint and several. *Id.* at 1256.

Mr. Yong Kim also relies on United States v. Harvey, No. CIV. 13-4023-KES, 2014 WL 2455533, at 4* (D.S.D. June 2, 2014) to argue that he has standing to challenge the entry of the default judgment against Susann

W. Kim. In Harvey, the court determined that, while a non-defaulting defendant may have standing to challenge the entry of default on behalf of three defaulted subsidiary entity defendants, the challenger failed to show good cause to set aside the entry of default as to the defendants. *Id*. In deciding whether good cause exists to set aside an entry of default, the court considered: (1) whether the conduct of the defaulting party was blameworthy or culpable; (2) whether the defaulting party has a meritorious defense; and (3) whether the other party would be prejudiced if the default were excused. *Id*. at 10.

Here, similar to the court's analysis in Harvey, no good cause exists to set aside an entry of default. Ms. Susann W. Kim has actively appeared and participated in this matter following her default, communicated with Appellant about the suit and attempted to submit documents to the court without ever moving to vacate her defaults. Ms. Susann W. Kim's conduct demonstrated a willful failure to comply with the civil rules or oppose the lawsuit. Additionally, there is no evidence with the trial court that Ms. Susann W. Kim has a meritorious defense to the allegations in the complaint. Further, Respondent would be prejudiced if the entry of default were set aside after over two and a half (2.5) years of litigation. *Id*. at 11.

Appellant's arguments and conduct throughout the matter demonstrates his intent to ignore procedure, obfuscate the record, and manipulate and delay court proceedings. To reverse the trial courts Orders would reward Mr. Yong Kim's obstructionist strategy and would further frustrate the legal process.

D. The Trial Court Properly Refused to Consider the Untimely Filed Documents Submitted by Ms. Susann W. Kim.

Mr. Yong Kim correctly points out that when considering related rulings, such as the decision to strike late filed pleadings, or in relation to attorneys' fees findings, this court of appeal will not overturn a trial court absent an abuse of discretion. There was no abuse of discretion by the trial court here. Appellant failed to respond to *both* Motion for Summary Judgments, failed to follow procedural rules concerning timeliness, and failed to file any motion to allow for submission of late materials. Ms. Susann W. Kim (Appellant's sister, a non-attorney, and a party with a default judgment from Appellant) appeared and attempted to file improper, contradictory, and untimely documents without moving to vacate her default orders or request permission to file late documents. The trial court was well within its discretion to reject the untimely and improper filings.

Division One applies an abuse of discretion standard to the rejection of untimely filed pleadings. A decision to "accept or reject untimely filed affidavits is within the trial court's discretion." *See* O'Neill v. Farmers Ins. Co. of Wash., 124 Wn. App. 516, 521, 125 P.3d 134 (2004) and Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004). Trial courts are in the best position to view how a case has transpired and have the most experience enforcing local rules. Whether to accept an untimely filed affidavit is the sort of case management decision best left in the trial court's hands. *See* Pitzer v. Union Bank of Cal., 141 Wn.2d 539, 556, 9 P.3d 805 (2000).

Here, it was the Respondent's *second time* filing a Motion for Summary Judgment and the *second time* Mr. Yong Kim failed to submit a response. (CP 251:2-3). Mr. Yong Kim's recourse is to now rely on his sister's documents who he himself claimed defrauded him. The trial court reviewed the file, noted that Appellant did not file a response, Ms. Susann W. Kim was a defaulted party and had orders of default entered against her by both remaining parties (Default Order – Terrace15, LLC on February 21, 2019 and Default Order – Mr. Yong S. Kim on December 12, 2019), Ms. Susann Kim was not a licensed attorney in Washington State, nor an

attorney of record for any party. (CP 50-51, CP 74-76, CP 251:2-13). Accordingly, the trial court properly rejected Ms. Susann W. Kim's filings because she lacked standing and because the documents were untimely and did not meet the requirements of local court rules, CR 5, CR 7, and CR 11. *(Id)*. The trial court's decision to not accept Ms. Susann W. Kim's documents for summary judgment was not an abuse of discretion.

Critically, despite knowledge of the motion, Appellant Mr. Yong Kim made no filings in response to or arguments in opposition to the motion; there were no genuine issues of material fact raised. After being sanctioned for the *exact* same neglect and failure to follow court procedure on the first scheduled summary judgment hearing, Mr. Yong Kim was acutely aware of the need to respond. (CP 446-447). There was no excusable neglect shown; it was simply neglect.

Appellant's reliance on Keck v. Collins, 184 Wn.2d 358, 357 P.3d 1080 (2015) and the Burnet factors to argue that the trial court abused its discretion by excluding Ms. Susann W. Kim's untimely filing is misplaced. The trial court properly noted the reasons for not considering the untimely documents and later confirmed the reasoning in its oral ruling on Mr. Yong Kim's Motion to Vacate. (CP 254-257; RP 25-29).

Additionally, Keck is distinguishable as the Burnet factors are silent concerning excluding untimely filings submitted by a defaulted party (Susann W. Kim) who lacked standing. For the second time, nothing was submitted by Appellant Mr. Yong Kim in opposition to Respondent's Motion for Summary Judgment. Instead, Counsel for Mr. Yong Kim, who does not represent Ms. Susann Kim, argues the trial court erred by refusing to accept late or untimely documents from her, a defaulted party to the case. Keck and Burnet are not applicable. This is a critical distinction between the facts of Keck and Burnet where the *opposing party* attempted to submit and respond with untimely affidavits; Appellant Mr. Yong Kim submitted no response to the motion for summary judgment. The trial court properly exercised its discretion to exclude the documents.

Further, under CR 11, Ms. Susann W. Kim does not have standing to represent Appellant in court as a non-lawyer. Under the circumstances and based on the court's prior dealings with Ms. Susann W. Kim and Mr. Yong Kim, the court refused to consider the filings as untimely and in violation of CR 5, CR 7 and CR 11. The trial court did not abuse its discretion by refusing to consider the untimely submissions.

If the argument is that the documents were submitted for Ms. Susann

W. Kim, both Respondent and Appellant Mr. Yong Kim had entered Orders of Default against Ms. Susann K. Kim. (CP 50-51, CP 74-76). As a result, Ms. Susann K. Kim was adjudged to be in default when Respondent filed its Motion for Summary Judgment and could not have responded without leave of the Court. CR 55(a)(2); Pedersen v. Klinkert, 56 Wn.2d 313, 320, 352 P.2d 1025 (1960). Despite knowledge and appearing prior to the Motion for Summary Judgment and at the Motion to Vacate, Ms. Susann W. Kim did not argue, oppose, or present any arguments nor move to vacate her default.

There was no error in the trial court's discretion used to refuse Ms. Susann W. Kim's untimely filed documents.

E. The Trial Court Properly Granted Respondent's Motion for Summary Judgment When Mr. Yong Kim Failed to Respond and Raise a Genuine Issue of Material Fact.

Over two years elapsed before Mr. Yong Kim asserted arguments concerning the validity of the purchase and sale agreement. Mr. Yong Kim put forth these arguments for the first time in his Motion to Vacate. (CP 365-384). These arguments were not a part of the files or record reviewed for the Motion for Summary Judgment nor were statute of fraud

arguments/theories a part of Mr. Yong Kim's answer and counter claims. (CP 36-43). These arguments should not be considered for the first time on appeal.

Generally, appellate courts will not entertain issues raised for the first time on appeal. RAP 2.5(a); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008). Similarly, appellate courts do not consider theories not presented below in the trial court. John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991). The reason for this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). Further, RAP 9.12 provides, "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." To do otherwise would be to undermine the rule that an appellate court is to engage in the same inquiry as the trial court in reviewing an order of summary judgment. Wash. Fed'n of State Employees v. Office of Fin. Management, 121 Wn.2d 152, 163, 849 P.2d 1201, 1206-1207, (1993) Wash. LEXIS 77, *18. *See* Kendall v. Douglas, Grant, Lincoln & Okanogan Cys. Pub. Hosp. Dist. 6, 118 Wn.2d 1, 8-10, 820 P.2d

497 (1991) (appellate court refused to consider evidence outside of the record submitted by party opposing summary judgment). This general rule serves to protect the enforceability of local court rules procedurally and prevent losing parties from having multiple opportunities to try their case. Mr. Yong Kim's arguments should not be considered for the first time on appeal.

As presented in Respondents' Motion for Summary Judgment, the facts concerning the purchase and sales agreement, seller and real property were not disputed. Respondent established that there was no genuine issue of material fact that the Buyer failed to close on the agreed upon closing date and the burden shifted to Mr. Yong Kim to establish specific facts to demonstrate the existence of a genuine issue of material fact. Here, Mr. Yong Kim, *twice*, did not file any response to the motion for summary judgment. Because Appellant Mr. Yong Kim did not respond to the motion, he did not meet the burden to establish an issue of fact to preclude summary judgment based on the facts asserted against him. *See* West v. Thurston County, 169 Wn. App. 862, 865-67, 282 P.3d 1150 (2012) (affirming trial court's dismissal of party's claims because, as they failed to respond to the opposing party's motion for summary judgment, they did not meet their

burden to establish an issue of fact). In addition, under RAP 9.12, the factual allegations raised by the Appellant here should not be considered on appeal because it was not in the trial court's record as evidence or issues called to the attention of the trial court when summary judgment was granted for the Respondent. Further, Mr. Yong Kim's assertions are factually incorrect. The Seller, Respondent Terrace15, LLC is the confirmed signatory Seller under the contract, the property exists, Buyer and Seller entered escrow, and only failed to close after the material breaches complained of in this matter. (CP 1-35).

F. The Trial Court Acted Within its Discretion When it Denied Appellant's Motion to Vacate for Failing to Show Excusable Neglect.

In this case, the trial court reviewed the briefings, considered oral argument and made a determination that Mr. Yong Kim's Motion to Vacate was not proper and that he failed to prove excusable neglect. (CP 436-437). The trial court "emphatically" denied the Motion to Vacate noting the gamesmanship, procedural violation, and inexcusable neglect. (RP 25-29).

Mr. Yong Kim's failure to respond to the summary judgment motion for a second time was not excusable neglect, it was neglect. (RP 28:18-19). The trial court found that Mr. Yong Kim was properly served, had retained

his third attorney, and was given proper notice through counsel. (RP 25:19-21). Mr. Yong Kim's argument that he thought his sister was handling the manner is akin to a breakdown of internal office procedures and such failure does not constitute excusable neglect under CR 60(b)(1). Ha v. Signal Elec., Inc., 182 Wn. App. 436, 450, 332 P.3d 991 (2014), review denied, 182 Wn.2d 1006 (2015); TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 213, 165 P.3d 1271 (2007); Prest v. Am. Bankers Life Assur. Co., 79 Wn. App. 93, 100, 900 P.2d 595 (1995), review denied, 129 Wn.2d 1007 (1996). In TMT, Petco failed to appear or respond to TMT's breach of contract summons and complaint because the legal assistant responsible for entering the deadline into the calendaring system forgot to do so before leaving on an extended vacation. TMT, 140 Wn. App. at 197-98. The court rejected Petco's argument that this constituted excusable neglect under CR 60(b)(1). *Id*. at 213. Similarly, in Prest, the court held that the general counsel's failure to respond to a summons and complaint because the documents had been mislaid in the office while the general counsel was out of town was not excusable neglect. Prest, 79 Wn. App. at 100.

Here, the failure to respond is even more egregious considering this

was the second time the *exact* scenario played out and Mr. Yong Kim was sanctioned the first time it occurred in September of 2019. (CP 446-447). Mr. Yong Kim does not deny he received the documents, does not deny he has been through this not once, but twice, continues to deflect by claiming he thought the courts were closed because of the pandemic, and that his sister was handling it all. (RP 25-29). The trial court expressed its dismay and frustration at Mr. Yong Kim's behavior of ignoring court deadlines and procedures throughout the proceedings as "gamesmanship" and a "way to manipulate and delay, obfuscate the record, and confuse the Court of Appeals." (RP 24:14-16). The denial of the Motion to Vacate was proper and within the discretion of the trial court.

IV. CONCLUSION

Respondent respectfully request the Court of Appeals to deny Appellant's assignments of errors 1-4 in their Brief. Appellant Mr. Yong Kim willfully chose to ignore Respondent's Motion for Summary Judgment, not once, but twice. The trial court noted the gamesmanship, procedural abuses, and willful disregard of the court system. The trail court did not abuse its discretion in not considering the untimely documents filed by Ms. Susann W. Kim, properly granted Respondent's Motion for

Summary Judgment, and correctly denied Appellant's Motion to Vacate. The gamesmanship and disregard of court proceedings cannot be rewarded and Mr. Yong Kim's request to overturn the trial court's decisions must be denied. Additional fees and costs should be awarded to Respondent.

DATED this 8th Day of November 2021,

Respectfully submitted by,

/s/ Robert D. Maxwell
Robert D. Maxwell WSBA# 46636
HOLMQUIST + GARDINER, PLLC
1000 Second Ave, Suite 1770
Seattle, Washington 98104
p: 206-438-9083 f: 206-694-4601

DECLARATION OF SERVICE

I, Kesha Fountain, under penalty of perjury under the laws of the State of Washington, hereby declare that on November 8, 2021, the following documents were served on the following individuals in the manner indicated below:

1) BRIEF OF RESPONDENT

Christopher W. Pirnke, WSBA #44378 Attorneys for Appellants Yong Kim 10900 N.E. 4th Street, Suite 1500 Bellevue, WA 98004 Tel: 425-455-1234 Fax: 425-635-7720 Email: Cpirnke@insleebest.com	☐ ☐ ☐ X X	U.S. Mail Messenger U.S. Mail E-service E-mail:

Dated this 8TH day of November 2021 at Seattle, Washington.

/s/ Kesha Fountain
Kesha Fountain
Paralegal

INSLEE BEST DOEZIE & RYDER, P.S.

May 27, 2022 - 4:20 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Terraces15, LLC, Respondent v. Sys, Inc., Mr. Yong S. Kim and Jane Doe Kim, Appellants (824058)

The following documents have been uploaded:

- PRV_Petition_for_Review_20220527161931SC413305_0831.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- imaxfunding@icloud.com
- rob@lawhg.net
- robdm3@gmail.com

Comments:

Sender Name: Christopher Pirnke - Email: cpirnke@insleebest.com
Address:
10900 NE 4TH ST STE 1500
BELLEVUE, WA, 98004-8345
Phone: 425-455-1234

Note: The Filing Id is 20220527161931SC413305