

No. 67155-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
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JOHN F. BUCHAN CONSTRUCTION INC.,
a Washington Corporation,

Respondent,

v.

MICHAEL GIACOMO AUSTIN, an unmarried individual,
GIACOMO DUMMOND AUSTIN, an unmarried individual,
J. P. CHASE BANK, N.A., a federally chartered bank as successor-in-
interest to WASHINGTON MUTUAL BANK, and
JOHN DOES and JANE DOES 1-10,

Appellants.

BRIEF OF APPELLANTS

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A. INTRODUCTION

Appellants Michael Austin and Giacomo Austin (“the Austins”) are students living in Italy. Their mother, Silvana Di Giacomo (Di Giacomo), gifted them a house in Redmond, Washington. After the house was damaged by fire while occupied by a tenant, Di Giacomo contracted with John F. Buchan, Inc. (“Buchan”) to rebuild the house. The contract was subsequently assigned to the Austins. A dispute arose over final payment for the reconstruction, and Buchan file a complaint against the Austins. Buchan served the Austins by publication and, despite having ready access to the Austins’ addresses in Italy, did not serve them personally. Instead, Buchan alleged it had satisfied the notice requirements by notifying Di Giacomo by email of the summons and complaint. Because they were never served, the Austins did not appear.

Buchan obtained a default judgment and decree of foreclosure against the Austins. As soon as they became aware of the default judgment and decree, the Austins filed a motion to vacate the judgment. The trial court denied the motion as well as the Austins’ subsequent motion for reconsideration.

Buchan failed to comply with the statute governing service by publication which requires the plaintiff use reasonable diligence to follow up on any information received that might reasonably assist in determining

the defendant's whereabouts. Buchan did not do so. Buchan also evaded the contractual requirement to pursue mediation and arbitration in the event of a dispute between the parties and resorted to the courts instead. Default judgments are strongly disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits. The Austins satisfied the four factors for vacating a default judgment laid out in *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

This Court should overturn the trial court's entry of default judgment and either order mediation and arbitration, or remand for trial on the merits.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in denying the Austins' Motion to Vacate Default Judgment.

2. The trial court erred in denying the Austins' Motion for Reconsideration.

(2) Issues Pertaining to the Assignments of Error

1. Did the trial court err in denying the Austin's motion to vacate default judgment when Buchan did not comply with the statute governing service by publication, and consequently the trial court did not

have personal jurisdiction over the Austins? (Assignments of Error Numbers 1, 2)

2. Did the trial court err in denying the Austin's motion to vacate the default judgment when the contract between the Austins and Buchan provided for mediation and arbitration in the event of a dispute between the parties? (Assignments of Error Numbers 1, 2)

3. Did the trial court abuse its discretion in denying the Austin's motion to vacate default judgment where default judgments are strongly disfavored and the Austins made the necessary showing for vacating the default under *White v. Holm*. (Assignments of Error Numbers 1, 2)

C. STATEMENT OF THE CASE

(1) Statement of Facts and Procedural History

Silvana Di Giacomo ("Di Giacomo") is a resident of Rome, Italy. CP 269, 271. At one time she owned a house in Redmond, Washington ("the House"). CP 269. The House was heavily damaged by fire while occupied by a tenant. CP 210. In March 2009, Di Giacomo contracted with John F. Buchan Construction, Inc. ("Buchan") to rebuild the house. CP 158-72. The contract was a "cost plus" contract with the total not to exceed \$856,140 plus additional amounts pursuant to approved change orders. CP 158-59, 270. The contract contained a mediation and

arbitration clause which provided that any dispute or claim arising between the parties related to the agreement would be submitted to mediation, and, if mediation failed to resolve the matter, would proceed to arbitration. CP 165.

The reconstruction began in 2009 and was substantially complete by July 2010. CP 9. Prior to completion of the house, Di Giacomo had gifted the house to her sons, Michael Austin and Giacomo Austin (collectively “the Austins”), and subsequently assigned the Buchan contract to them. CP 137, 139, 184, 269, 272, 275. The Austins are also residents of Italy. CP 137, 139.

During the rebuilding of the House, Buchan received regular payments from Di Giacomo’s insurer. CP 270. Nevertheless, in August and September 2010, Buchan filed two lien claims with the King County Recorder. CP 8-13.

Di Giacomo had an agreement with Buchan in which she agreed to tender the final payment from her insurer of \$184,699.51 and Buchan would refund to her the amounts she herself had paid to various subcontractors. CP 270-71. Di Giacomo attempted to make final payment to Buchan of \$184,699.51, but Buchan refused to accept payment because the check contained a memo noting it as “final payment house.” CP 175.

After Di Giacomo tendered the check, she discovered that Buchan had not completed certain items required under the contract, and had not completed certain items in a workmanlike manner or caused damage to the property. CP 270. There were other billing issues which were difficult to resolve from Italy. Buchan charged approximately \$20,000 to remove ammunition stored in the fire-damaged house by the prior tenant, but never produced invoices for that work. CP 270. Buchan billed for work provided by various subcontractors for which Di Giacomo herself had paid. *Id.* In addition to various other shortcomings concerning Buchan's work on the House, Di Giacomo discovered an unexplained \$99,503.34 carry over charge in Buchan's final invoice that had no supporting invoices. *Id.* Because it was a "cost plus" contract in which subcontractor and labor and material costs were reimbursable, Di Giacomo requested copies of relevant invoices, but Buchan never provided those invoices to her. CP 159, 270-71.

On September 22, 2010, Di Giacomo sent Buchan an email disputing the amount she owed Buchan. CP 178, 270. Scarcely two weeks later, on October 7, 2010, despite the fact that the contract contained a provision requiring mediation/arbitration for any dispute between the parties, Buchan filed a complaint for breach of contract, unjust enrichment, and foreclosure of lien. CP 16. The complaint named

the Austins and J.P. Morgan Chase Bank, N.A., the holder of the mortgage on the House, as well as John and Jane Does 1-10. It did not name Di Giacomo who no longer had an ownership interest in the House, having previously gifted it to the Austins. Buchan attempted to serve the Austins at the House where they were not living, even though Buchan, as part of the rebuild process, had communicated regularly with the Austins and Di Giacomo in Italy and had their addresses (both email and physical.) CP 28-29, 271, 274, 277.

On October 12, 2010, Romney Brain (“Brain”), attorney for Buchan, emailed Di Giacomo in Rome. CP 24. In that email, Brain informed Di Giacomo that Buchan had turned the matter of delinquent sums over to him for collection. *Id.* He informed her that “Attached to this e-mail you will find a Complaint For Breach of Contract, Unjust Enrichment and Foreclosure of Lien that we have filed on behalf of the company.”¹ CP 24-25. Brain went on to write, “If you choose to defend the Complaint, you will need to contact an attorney to represent you in the matter.” CP 25. No service was made on the Austins, nor was the email addressed to the Austins even though they, not Di Giacomo, were named defendants and even though Buchan had the Austins’ email addresses. CP 274, 277.

¹ The email heading does not indicate that the complaint was actually attached.

Di Giacomo responded on October 14, 2010, briefly explaining once again her dispute with Buchan over the amount owed, and assuring Brain that she had most certainly not “refused to pay them what I owe them.” CP 24. Brain responded the same day, saying he preferred not to resolve the issue “through long distance emails” asking that Di Giacomo send a check for the “undisputed amount due” as long as she would agree that it was not a “final” payment. CP 24. Any additional amounts owing would still need to be resolved. *Id.* On October 16, 2010, Di Giacomo sent Brain a lengthy email detailing her views on Buchan’s invoice. CP 23-24. Notably, she debunked Buchan’s statements that she and her sons were living in Washington. CP 24. She wrote plainly that one of her sons was “working between Milan and London” and the other was “in the Rome area while I am in Rome.” CP 24.

On November 5, 2010, Buchan filed a declaration of service by publication pursuant to RCW 4.28.100. CP 20-21. In the declaration, Buchan stated that the Austins were not residents of Washington, and, citing Di Giacomo’s email to Brain, stated that one son was residing between Milan and London and the other was residing in Rome. CP 20-21. The declaration stated that Buchan would send a copy of the Complaint, Summons, Case Schedule, and Case Information sheet to the Austins at “their last-known address” – namely the House on which

Buchan had been contracted to work and was the subject of the dispute and complaint. CP 21.

Buchan published the summons in the Redmond Reporter on six dates between November 19, 2010 and the end of December, 2010. The final publication was on Christmas Eve. CP 57. The summons required the Austins to appear 60 days from the first date of publication. CP 57.

On January 28, 2011, Buchan moved for an order of default. CP 28-31. The trial court issued an order of default on February 7, 2011. On March 22, 2011, the trial court entered a judgment and decree of foreclosure. CP 121-23. The court ordered total judgment of \$238,649.37 against the Austins, plus attorney fees and costs, and ordered that the House be sold by the King County sheriff to satisfy the judgment. CP 123.

On March 9, 2011, Di Giacomo emailed Brain again expressing concern at having heard nothing from his office since her October 16 email and confirming her address in Rome. CP 196. In that same email, she asked whether Brain would need the Austins' addresses as well. *Id.* Brain responded, by reiterating that he had emailed a copy of the summons and complaint to her back in October, stating "In other words, we provided you with actual notice of the Complaint we had filed and suggested that you needed to take action on that." CP 195. He proceeded

to claim that Di Giacomo “elected to take no action on the Complaint...”
Id. Brain informed Di Giacomo that Buchan had served the complaint by publication and that an order of default had already been entered, stating that he would separately send her a copy of the order. *Id.* He then informed Di Giacomo that Buchan would proceed within a week to obtain default judgment and a writ of execution authorizing the sheriff to sell the house. *Id.*

It was only then that Brain, for the first time, requested that Di Giacomo provide him with the Austins’ contact information – more than *four months* after Buchan filed the declaration in support of service by publication. *Id.* “In the meantime,” Brain wrote, “because your two sons own the property at this point, I would appreciate it if you could send me their addresses and emails.” *Id.*

Alarmed by Brain’s email, Di Giacomo retained Jerry Walker who - within one month of Brain’s email and only 15 days of the entry of the order - filed a motion on behalf of the Austins to vacate the default order and decree of foreclosure. CP 130-36. The trial court denied the motion. CP 207-08.

The Austins filed a motion for reconsideration, which the trial court also denied. CP 209-83, 288. The Austins timely appealed. CP 289-93.

After the appeal was filed, the Austins moved the trial court to stay the Sheriff's Sale and to accept the House as security. On July 15, 2011, the trial court denied that motion as well. The Austins filed a motion objecting to the supersedeas decision with this Court. On July 29, Commissioner Neel of this Court stayed the Sheriff's Sale and remanded to the trial court for proceedings to determine the value of the property. A copy of the Commissioner's ruling is attached as Appendix A.

D. SUMMARY OF ARGUMENT

Buchan did not comply with the requirement of the service by publication statute which requires the plaintiff make reasonably diligent efforts to locate the defendant. Buchan had communicated with the Austins in Italy, and Di Giacomo could have readily provided Buchan with the Austins' addresses. Because Buchan failed to strictly comply with the statute, the trial court did not have jurisdiction over the Austins. The Court may reverse on this basis alone.

The contract with Buchan required mediation/arbitration in the event of a dispute between the parties. If parties agree to arbitration, neither party may unilaterally bring an action in the courts in lieu of the alternative dispute resolution proceeding. The Court may also reverse on this basis alone.

Washington courts have a strong policy against default judgments, preferring instead that the parties get their day in court to resolve the issues on the merits. The Austins have satisfied the requirements for setting a default judgment aside. They have a meritorious defense; their failure to appear was occasioned by surprise and excusable neglect; they diligently responded to the default judgment; and reversal will not result in hardship for Buchan.

E. ARGUMENT

- (1) Buchan Did Not Comply With the Statute Governing Service By Publication and Consequently the Trial Court Did Not Have Personal Jurisdiction Over the Austins

A trial court's decision to grant or deny a motion to vacate a default judgment for lack of jurisdiction is reviewed de novo. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997).

Buchan argued below that the Austins were properly served. They have not. Buchan did not comply with RCW 4.28.100 which requires a plaintiff to make diligent efforts to locate the defendant. Buchan also argued that the Austins had “actual notice” of the suit because Buchan’s attorney emailed a copy of the summons and complaint to Di Giacomo. CP 147. That argument fails for three reasons. (1) The service statutes make no provision for service by email, (2) Di Giacomo was not a named defendant, and (3) failure to comply with the statutory requirements of

service deprives the court of personal jurisdiction over the defendant, even if the defendant received *actual notice* of the proceeding.

Due process guarantees the defendant the right to notice and opportunity to be heard. 15A Karl B. Tegland, *Washington Practice: Washington Handbook of Civil Procedure* § 15.2 at 211 (2010). An action commenced without jurisdiction will be dismissed, and any judgment entered in the absence of jurisdiction is void. *Id.* at § 10.1 at 171 (2010), citing *Weiss v. Glemp*, 127 Wn.2d 726, 731-34, 903 P.2d 455 (1995). The purpose of statutes which prescribe the methods of service of process is to provide due process.” *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858, 859 (1991). Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Carson v. Northstar Development Co.*, 62 Wn. App. 310, 317, 814 P.2d 217 (1991). Until notice is given to a defendant, the court has no jurisdiction to proceed to judgment. *Id.* Failure to comply with the statutory requirements of service deprives the court of personal jurisdiction over the defendant, even if the defendant received *actual notice* of the proceeding. *Weiss*, 127 Wn.2d at 731-34. Actual knowledge is insufficient to impart the notice required to invoke personal jurisdiction.

Interior Warehouse Co. v. Hays, 91 Wash. 507, 158 P. 99 (1916); *Thayer v. Edmonds*, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972).

If default judgment is rendered against a party who was entitled to, but did not receive, notice, the judgment will be set aside. *Tiffin v. Hendricks*, 44 Wn.2d 837, 847, 271 P.2d 683 (1954).

RCW 4.28.100 provides for service by publication when the defendant cannot be found within the state, and upon the filing of an affidavit of the plaintiff stating that he believes that the defendant is not a resident of the state.² The statute also requires the plaintiff deposit a copy of the summons and complaint in the post office, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant. *Id.* Service by publication is in derogation of the common law and cannot be used when personal service is possible. *Dobbins*, 88 Wn. App. at 871. One claiming jurisdiction under the statute has the burden of showing proper service by publication. *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn. App. 358, 362-63, 75 P.3d 1011 (2003), *review denied*, 151 Wn.2d 1020 (2004). He cannot meet this burden merely by reciting the relevant statutory factors in

² RCW 4.28.100(3) provides for service by publication when the defendant is not a resident of the state, but has property therein and the court has jurisdiction of the subject of the action. CR 4(i)(1), in contrast, authorizes personal hand-to-hand service in a foreign country.

conclusory fashion; rather, he must produce “facts which support the conclusions required by the statute.” *Id.* Strict compliance with the statutes governing service by publication is necessary to support a judgment. *Dobbins*, 88 Wn. App. at 871.

In order to justify service by publication, the plaintiff must first exercise diligence in attempting to locate the defendant for personal service. *Boes v. Bisiar*, 122 Wn. App. 569, 574, 94 P.3d 975 (2004), *review denied*, 153 Wn.2d 1025 (2005); 15A Karl B. Tegland, *Washington Practice: Washington Handbook of Civil Procedure* § 16.2 at 227 (2010). Due diligence requires that the plaintiff make “honest and reasonable efforts to locate the defendant.” *Martin v. Meier*, 111 Wn.2d 471, 482, 760 P.2d 925 (1988). While reasonable diligence does not require the plaintiff to employ all conceivable means to locate the defendant, it does require the plaintiff to follow up on any information received that might reasonably assist in determining the defendant's whereabouts. *Carson*, 62 Wn. App. at 316.

The issue before a court on a post-judgment motion is not simply whether the affidavit required by RCW 4.28.100 is sufficient, but whether the plaintiff, in fact, made an honest and reasonable effort to locate the defendant before seeking service by publication. *Id.* Where a reasonable lead exists, it is the act of pursuing that lead, not its ultimate success,

which evidences due diligence. *Pascua v. Heil*, 126 Wn. App. 520, 530-31, 108 P.3d 1253 (2005). A plaintiff cannot throw his hands in the air and claim that he conducted a diligent search when he failed to pursue information which, on its face, had a reasonable possibility of being fruitful. *Id.* Before resorting to service by publication, a plaintiff should make efforts to locate the defendant by contacting those who might know where the defendant can be found, such as the defendant's friends and business associates. *Charboneau*, 118 Wn. App. at 363.

Service of process may be effected upon an out-of-state defendant by certified mail when such an alternative method of service is reasonably likely to actually reach or inform the party of the pending action. *Ashley v. Superior Court In and For Pierce County*, 83 Wn.2d 630, 638, 521 P.2d 711 (1974). The probability that the defendant will actually receive notice when served by certified mail is greater than it would be if publication were the method employed. *Id.*

Here, Buchan submitted a declaration in support of service by publication which attached as an exhibit a series of emails between Di Giacomo and Brain. CP 20-25. In an email to Brain scarcely a week before the declaration was signed, Di Giacomo stated plainly one of her sons was "working between Milan and London" and the other was "in the Rome area while I am in Rome." CP 24. Buchan specifically referenced

that statement to support its assertion that the Austins are not residents of this state. CP 20-21. But Buchan already had the Austins' email and physical addresses having communicated with them during the rebuild. It could readily obtain that information from Di Giacomo had it chosen to do so. Where Buchan was in possession of information that might reasonably assist in determining the Austins' whereabouts, but failed to follow up on that information, Buchan did not make the honest and reasonable effort necessary to allow for service by publication. *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 187, 765 P.2d 1333 (1989). Under the overwhelming weight of the authority cited above, RCW 4.28.100 required Buchan to make diligent efforts to locate the defendant. Buchan could not have received plainer notice that the Austin's were living abroad than their mother's email stating so. Before resorting to service by publication, a plaintiff should make efforts to locate the defendant by contacting those who might know where the defendant can be found, such as the defendant's friends and business associates. *Charboneau*, 118 Wn. App. at 363. Di Giacomo was both family and, effectively, a business associate of the Austins. Had Buchan obtained the Austins' addresses from Di Giacomo, it could have served the Austins by certified mail. But Buchan made no such effort. Instead, a little more than a week after being informed of the Austins' whereabouts, it filed the declaration.

In fact, it was not until *four months* after the publication of the summons that Buchan sought to obtain the Austins' addresses and email addresses "because your two sons own the property at this point." CP 195. And then only in response to Di Giacomo's query whether Buchan needed them. CP 196.

Buchan woefully failed to perform even the most basic diligence required under RCW 4.28.100 and the relevant case law. It did not make an honest and reasonable effort to locate the Austins before seeking service by publication. In truth, it threw its hands in the air and failed to pursue information which, on its face, had a reasonable possibility of being fruitful. It did not even assert that it performed any diligent search at all. It merely relied on Di Giacomo's email as evidence that the Austins were not residents of Washington and left it at that. Where Buchan performed no diligent search whatsoever, it did not comply with the statute. Strict compliance with the statutes governing service by publication is necessary to support a judgment. Failure to comply with the statutory requirements of service deprives the court of personal jurisdiction over the defendant.

Buchan also argued below that the Austins had "actual notice" of the suit because it had emailed the summons and complaint to Di Giacomo. CP 147, 48. That argument fails.

The service statutes make absolutely no provision for service by email, and Buchan never presented any authority for the proposition that emailing the summons and complaint constituted proper service.³ Indeed, as noted above, failure to strictly comply with the statute deprives the court of personal jurisdiction over the defendant. Where the statutes do not allow service by email, relying on such service is necessarily a failure to strictly comply with the statutory requirements.

Di Giacomo was not a named defendant. Here too, Buchan provided no authority for the proposition that emailing the defendants' mother could possibly be considered proper service on the defendants themselves.

Finally, Buchan's insistence that the Austins had "actual notice" is contrary to clear Washington law. Failure to comply with the statutory requirements of service deprives the court of personal jurisdiction over the defendant, even if the defendant received *actual notice* of the proceeding. *Weiss*, 127 Wn.2d at 731-34.

Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void. *In re Marriage of Markowski*, 50 Wn. App.

³ GR 5, which applies to service upon the opposing party *after* the action has commenced allows service by email only by agreement between the parties. It does not apply to serving a summons and complaint.

633, 636, 749 P.2d 754 (1988). A court has a nondiscretionary duty to vacate a void judgment. *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323, 877 P.2d 724 (1994). The trial court should have granted the Austins' motion to vacate and motion to reconsider and voided the judgment. This Court, reviewing de novo, can reverse the trial court on this basis alone.

(2) The Contract Between the Austins and Buchan Provided For Mediation and Arbitration In the Event of a Dispute Between the Parties

Appellate courts review questions of arbitrability de novo, and determine the arbitrability of the dispute by examining the arbitration agreement between the parties. *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 403-04, 200 P.3d 254 (2009); *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45-46, 17 P.3d 1266 (2001). If it can be fairly said that the parties' arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration. *Davis v. General Dynamics Land Systems*, 152 Wn. App. 715, 718, 217 P.3d 1191 (2009), *review denied*, 168 Wn.2d 1022 (2010). The party arguing that arbitration is not required under a contract bears the burden of showing his case is unsuitable for arbitration. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 453, 45 P.3d 594 (2002). A contract providing for arbitration will be interpreted in a manner favorable to arbitration. *Mendez*, 111 Wn. App. at 457.

There is a strong public policy in Washington State favoring arbitration of disputes. *Heaphy v. State Farm Mut. Auto. Ins. Co.*, 117 Wn. App. 438, 445, 72 P.3d 220 (2003), *review denied*, 150 Wn.2d 1037 (2004). The purpose of arbitration is to avoid the formalities, the expense, and the delays of the court system. *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 766, 934 P.2d 731 (1997). In determining whether the two parties agreed to arbitrate the particular dispute, appellate courts consider four guiding principles: 1) the duty to arbitrate arises from the contract; 2) a question of arbitrability is a judicial question unless the parties clearly provide otherwise; 3) a court should not reach the underlying merits of the controversy when determining arbitrability; and 4) as a matter of policy, courts favor arbitration of disputes. *Stein*, 105 Wn. App. at 45-46. If the parties agree to arbitration, neither party may unilaterally bring an action in the courts in lieu of the arbitration proceeding. *Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 161, 516 P.2d 1028 (1973); *Meat Cutters Local 494 v. Rosauer's Super Markets, Inc.*, 29 Wn. App. 150, 627 P.2d 1330 (1981), *review denied*, 96 Wn.2d 1002 (1981). Agreements to mediate disputes are likewise enforceable. *Yaw v. Walla Walla School Dist. No. 140*, 106 Wn.2d 408, 411, 722 P.2d 803 (1986).

In *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 890 P.2d 1071 (1995), this Court affirmed the summary dismissal of

the suit where the plaintiffs filed suit without pursuing the contractual dispute resolution process, did not give written notice of the claim, and the defendants did not waive the notice requirement. *Id.* 139-40. Where an agreement provides for a method of resolving disputes that may arise between the parties, that method must be pursued before either party can resort to the courts for relief unless the right to arbitration is waived. *Harting v. Barton*, 101 Wn. App. 954, 961, 6 P.3d 91 (2000), *review denied*, 142 Wn.2d 1019 (2001).

Here, the contract contained a provision for dispute resolution which stated that:

[A]ny controversy, dispute or claim arising between the parties that is directly or indirectly related to this Agreement...shall be submitted to mediation, and, if not resolved by mediation within 15 days after the initial mediation, shall be resolved by binding single-arbitrator arbitration....

CP 165-66.

The plain language of the contract shows that the parties shared a clear intent to submit all disputes between the parties relating to the contract to arbitration. Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. *Heights at Issaquah Ridge*, 148 Wn. App. at 407.

Buchan, however, attempted to evade the plain language of the contract by pointing to a further provision which reads:

At either party's election, the following may be excluded from the mediation and arbitration provisions of this Article: ...any action involving, as a plaintiff or a defendant, a person or entity which is not a party to this agreement.

CP 165-66.

Buchan included as defendants J.P. Morgan Chase Bank N.A. ("Chase"), the mortgage holder on the House, and John Does 1-10 and Jane Does 1-10. It then argued to the trial court that the mediation/arbitration clause was inapplicable because the action included Chase, the Austins' lender. CP 151-52.

The common meaning of the dispute resolution provision is that any third party would be excluded from mediation and arbitration. Neither the complaint nor Buchan's briefing below address the John and Jane Does in any manner. John and Jane Doe do not enter into Buchan's arguments and claims, beyond appearing in the case caption. Nowhere is there any indication that Buchan had a dispute of any kind with Chase. Chase is mentioned in Buchan's briefing only to the extent Buchan filed a mechanics' lien and was providing notice to an entity that had an interest in the subject property. CP 152. In that respect Chase was not a

“defendant” in the traditional sense – it was merely being put on notice of the lien.

It would appear that both Chase and the John and Jane Does appear in the caption solely as way for Buchan to evade the dispute resolution terms of the contract. The dispute here is between Buchan and the Austins. Buchan sued the Austins for breach of contract, unjust enrichment, and foreclosure of lien. As such, the dispute should have gone to mediation and, if mediation had failed to resolve the issue, to arbitration. Buchan could not ignore the terms of the contract and unilaterally bring the case to court instead of to alternate dispute resolution. Instead of making demand for mediation or arbitration, Buchan chose to serve by publication and to obtain a default judgment. Under Buchan’s reasoning, it could always evade mediation/arbitration by merely including a mortgage holder in any suit brought under the contract. Given the strong public policy in Washington State favoring arbitration of disputes, the trial court should not have entered an order of default, but should instead have required Buchan to pursue mediation/arbitration as required by the contract. Should this Court not reverse on the basis of improper service, it may reverse on the grounds that Buchan was required by contract to undergo mediation/arbitration before turning to the courts.

(3) Default Judgments Are Strongly Disfavored and the Austins Made the Necessary Showing For Vacating the Default Judgment Under *White v. Holm*

If this Court does not reverse on the basis of improper service or failure to pursue mediation/arbitration under the Contract, it should reverse under *White v. Holm*, 73 Wn.2d at 352.

A trial court's ruling on a motion to vacate a default judgment is reviewed for an abuse of discretion. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). A trial court's ruling on a motion to reconsider is likewise reviewed for an abuse of discretion. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties get their day in court and resolve disputes on the merits. *Morin v. Burriss*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007); *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). Because default judgments are generally disfavored, a trial court should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done. *Id.* at 582. Courts

ordinarily should determine cases on their merits rather than by default. *Id.* at 581.

A trial court's decision on a motion to vacate a default judgment must be just and equitable. *Calhoun v. Merritt*, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986). The trial court must balance the requirement that each party follow procedural rules with a party's interest in a trial on the merits. *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099, *review denied*, 150 Wn.2d 1020 (2003) (“Justice is not done if hurried defaults are allowed...”). Consequently, this Court evaluates the trial court's decision by considering the unique facts and circumstances of the case before it. *Calhoun*, 46 Wn. App. at 619. Appellate courts are more likely to reverse a trial court decision that upholds a default judgment than a decision which sets a default judgment aside. *Colacurcio v. Burger*, 110 Wn. App. 488, 494-95, 41 P.3d 506 (2002), *review denied*, 148 Wn.2d 1003 (2003).

A judgment may be vacated when it is void for mistakes, inadvertence, surprise, excusable neglect, or irregularity. CR 60(b). In determining a motion to vacate, the trial court does not make factual determinations; rather, the court evaluates whether the movant, under CR 60(b), has established substantial evidence of a prima facie defense. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837

(2000), *review denied*, 143 Wn.2d 1021 (2001). Significantly, the court must review the evidence in the light most favorable to the moving party. *Pfaff*, 103 Wn. App. at 834.

A party moving to vacate a default judgment must be prepared to show (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated. *White v. Holm*, 73 Wn.2d at 352. This is not a mechanical test; whether or not a default judgment should be set aside is a matter of equity. *Id.* at 351. The four factors vary in significance; factors (1) and (2) are primary, while factors (3) and (4) are secondary. *Id.* at 352–53. A strong defense requires less of a showing of excuse. 14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 9.29 at 326 (2009).

The trial court examines the evidence and reasonable inferences in the light most favorable to the moving party to determine whether there is substantial evidence of a prima facie defense. *Pfaff*, 103 Wn. App. at 834. Moreover, if a strong defense is demonstrated, the court will spend little time inquiring into the reasons for the failure to appear and answer, provided the moving party timely moved to vacate and the failure to

appear was not willful. *Johnson*, 116 Wn. App. at 841 (quoting *White v. Holm*, 73 Wn.2d at 352). When the moving party's evidence supports no more than a prima facie defense, the reasons for the failure to timely appear will be scrutinized with greater care. *Johnson*, 116 Wn. App. at 842; *White v. Holm*, 73 Wn.2d at 352–53.

(a) The Austins Have a Meritorious Defense

In order to vacate a default judgment, a defendant must be able to demonstrate a valid defense on the merits. *Pfaff*, 103 Wn. App. at 834. The defendant must demonstrate at least a prima facie defense, but need not prove the defense by a preponderance of the evidence. *Id.* A prima facie defense, *however tenuous*, is sufficient to support a motion to vacate a default judgment.⁴ *C. Rhyne & Assocs. v. Swanson*, 41 Wn. App. 323, 328, 704 P.2d 164 (1985).

The Austins have a strong defense to Buchan's claim. As detailed in Di Giacomo's declaration, Buchan charged approximately \$20,000 to remove ammunition left in the fire damaged house by the tenant. CP 270. Di Giacomo and her insurer requested invoices for that work which Buchan did not produce. *Id.* Buchan charged \$30,130.98 plus mark up

⁴ A defendant need not demonstrate a meritorious defense in order to have a default judgment vacated on the grounds that the court lacked jurisdiction to enter judgment. *Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 792, 591 P.2d 1222 (1979). As argued above, the trial court lacked jurisdiction over the Austins.

and taxes for a septic tank, an amount Di Giacomo herself paid in its entirety. *Id.* Di Giacomo paid an additional \$5,500 to a subcontractor, but Buchan billed her that amount. *Id.* The bonus room was half the size contemplated in the Contract and never completed. *Id.* The appliances were not installed. *Id.* Buchan charged \$23,803.11 for landscaping which was almost entirely incomplete. Buchan's negligence resulted in water damage to the garage from improperly functioning sprinklers. *Id.* The final invoice contained an unexplained carry over charge of \$99,503.34 and Buchan provided no supporting invoices despite Di Giacomo's request. *Id.* Di Giacomo had an agreement with Buchan in which she agreed to tender the final payment from her insurer of \$184,699.51 and Buchan would refund to her the amounts she herself had paid to various subcontractors. CP 270-71. Di Giacomo attempted to make final payment to Buchan of \$184,699.51, but Buchan refused to accept payment because the check contained a memo noting "final payment house." CP 175. Finally, the final contract price exceeded the "not to exceed amount." CP 270.

In short, the Austins demonstrated the necessary facts to present a prima facie defense, and did not rely on mere argument or conclusions. *Calhoun*, 46 Wn. App. at 620. A declaration, such as Di Giacomo's, viewed in the light most favorable to the Austins, is sufficient to establish

a prima facie defense. *Gutz v. Johnson*, 128 Wn. App. 901, 917, 117 P.3d 390 (2005), *affirmed*, 161 P.3d 956 (2007).

The Austins have more than satisfied the requirement that they put forth at least a prima facie case required under *White v. Holm* and *Pfaff*.

(b) The Austins Failure to Appear Was Occasioned By Surprise and Excusable Neglect

Consider the speed with which Buchan brought its claim against the Austins. On September 2, 2010, Buchan refused Di Giacomo's check because the memo indicated "final payment on house." CP 175. There followed a series of emails between Di Giacomo and Buchan. CP 174-75. On September 22, 2010, Di Giacomo sent Buchan an email disputing the amount she owed Buchan. CP 178, 270. Buchan filed its complaint scarcely two weeks later, on October 7, 2010. CP 16. Less than four weeks after that, Buchan filed its declaration in support of service by publication – even though it had the Austins' mailing addresses and email addresses, and ready access to the Austins' contact information through Di Giacomo. CP 20-21. As argued above, the Austins were never properly served. There is no indication that Di Giacomo ever even received the email attachments of the summons and complaint Buchan claimed to have sent her. Emailing those documents to Di Giacomo did not in any way constitute service on her sons in any event. The Austins were simply not

on notice that suit had been brought against them and that a default judgment entered. They were, indeed, taken by surprise, and any “neglect” in responding is certainly excusable. A failure to provide notice of default proceedings when required is generally regarded as “a serious procedural error” that justifies vacation. *Gage v. Boeing Co.*, 55 Wn. App. 157, 164, 776 P.2d 991 (1989), *review denied*, 113 Wn.2d 784 (1989).

If Buchan was hoping to take advantage of the Austins’ absence from the State to ensure they did not appear, it certainly succeeded in the trial court. This Court should hold otherwise.

(c) The Austins Diligently Responded to the Default Judgment

When deciding whether to vacate a default judgment, the trial court will consider the diligence with which the defendant responded upon learning of the default judgment. *Calhoun*, 46 Wn. App. at 622. The Austins filed their motion to vacate the order and decree of foreclosure only 15 days after it was entered. CP 130-36. This constituted a diligent response under any circumstance, and is especially so considering the Austins were hampered in obtaining Washington counsel by being resident overseas. A party that moves to vacate a default judgment within one month of notice satisfies CR 60(b)'s diligence prong. *Johnson*, 116 Wn. App. at 842. Furthermore, where service is by publication, RCW

4.28.200 allows the defendant to move to have default judgment vacated within one year of its entry. Under *Johnson* and RCW 4.28.200, the Austins responded diligently.

(d) Reversal Will Not Result In Hardship to Buchan

Buchan will suffer no hardship if this Court reverses. It would simply have to undertaken mediation/arbitration or prove the allegations in its complaint in trial, which is not sufficient grounds to defeat the Austins' effort to reverse default judgment. *Gutz*, 128 Wn. App. at 920-21. The possibility of a trial is an insufficient basis for the court to find substantial hardship on the non-moving party. *Pfaff*, 103 Wn. App. at 836; *see also*, *Cash Store*, 116 Wn. App. at 842 (“vacation of a default inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits.”). This reasoning is consistent with Washington's policy that prefers parties resolve disputes on the merits, as opposed to default proceedings. *Wild Oats*, 124 Wn. App. at 511.

Because the Austins satisfied the four factors that demonstrate they are entitled to relief under *White v. Holm*, the trial court abused its discretion in denying their motion to vacate the default order and judgment.

F. CONCLUSION

The trial court did not have jurisdiction over the Austins because Buchan failed to exercise reasonable diligence in locating the Austins as required under RCW 4.28.100. The contract with Buchan mandated mediation and arbitration to resolve any disputes between the parties. Buchan turned its back on that provision of the contract and improperly chose to pursue a remedy in the courts instead. Default judgments are heavily disfavored in Washington. The Austins satisfied the four factors laid out in *White v. Holm*.

This Court should reverse the trial court and either order mediation and arbitration or remand for trial on the merits.

DATED this 1st day of August, 2011.

Respectfully submitted,



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APPENDIX

APPENDIX A

RICHARD D. JOHNSON,
Court Administrator/Clerk

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July 29, 2011

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CASE #: 67155-3-I

John F. Buchan Construction, Respondent v. Michael Giacomo Austin, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on July 29, 2011, regarding appellant's emergency motion objection to supersedeas decision:

"Defendants/appellants Michael Austin and Dummond Austin have filed an emergency motion objecting to the trial court decision denying the Austin's motion to stay enforcement of a money judgment pending appeal. I heard oral argument this morning. The sheriff's sale is scheduled for August 5, 2011. In the interest of a prompt decision, this ruling will be brief.

When Silvana Digiacomio's house burned down, she contracted with plaintiff/respondent John F. Buchan Construction to rebuild the house. Digiacomio assigned the property and her contract with Buchan to her sons Michael and Dummond Austin. A dispute arose over the amount owed. Buchan filed a mechanics liens on the property totaling \$217,172.37. The Austins and Digiacomio live in Italy. Buchan sued, served the Austins by publication, and obtained a default judgment plus interest for \$238,649.37. The trial court denied the Austins' motion to vacate the default and denied reconsideration. The Austins appeal is proceeding.

On June 15, 2011, the trial court issued an order for a sheriff's sale of the Austins' home. On June 21, 2011, the sheriff issued a notice of sale, which is set for August 5, 2011. The Austins filed a motion to stay enforcement of the judgment pending appeal using the value of the property as alternate security in lieu of cash or a bond. Buchan opposed the request. On reply the Austins provided additional information about the value of the property. On July 15, 2011, the trial court denied the Austins' motion.

In this court the Austins are proceeding under RAP 8.1(h), objecting to the trial court's supersedeas decision. The amount of the supersedeas is not at issue. The parties agree that by the time the appeal is likely complete, i.e. approximately 12 months, the judgment plus 12% interest will be approximately \$275,000. Adding an attorney fee award and the reasonable rental value of the property leads to a supersedeas of approximately \$342,000. The Austins argue that the value of the property alone is sufficient in lieu of cash or a bond, arguing that the contracted price for the rebuild was \$850,000, the assessed tax value is \$1,500,000, and Buchan intended to list the property at more than \$2 million. The evidence before me indicates the Austins have a mortgage with a principal balance of approximately \$500,000. The Austins assert that there are no other encumbrances on the property, although they have not provided evidence of this. Buchan argues that the value is simply unknown. At oral argument Buchan acknowledged that an appraisal would provide key evidence of value. Buchan also argued that even a high property value may not secure the judgment and other amounts if, for example, the value of the property declines or the Austins default on the mortgage. But under RAP 8.1(g), Buchan would be free, upon good cause shown, to seek modification of the supersedeas.

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Case No. 67155-3-I, Buchan v. Austin
July 29, 2011

The property at issue clearly has significant value. It may be that it is high enough to secure the judgment, interest, attorney fees, and any other amounts without posting cash or a bond. Or it may be that the property value is sufficient to act as partial security. I will grant a stay of the sheriff's sale set for August 5, 2011 and remand to the trial court to allow a brief opportunity for the Austins to provide additional information as to value, such as an appraisal and evidence of whether there are any other encumbrances, and for the trial court to consider the supersedeas decision in light of the new evidence. The amount of time the Austins will have to provide the new information, as well as any other parameters regarding the supersedeas decision, are for the trial court to decide in its discretion.

Therefore, it is

ORDERED that the sheriff's sale scheduled for August 5, 2011 is stayed and the matter is remanded to the trial court to allow the Austins a brief opportunity to provide additional information of value, and for the trial court to consider the supersedeas decision in light of the new evidence."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

emp

DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Brief of Appellants in Court of Appeals Cause No. 67155-3-I to the following parties:

Jerry E. Walker
Walker Law Offices
2820 Northrup Way, Suite 130
Bellevue, WA 98004-1419

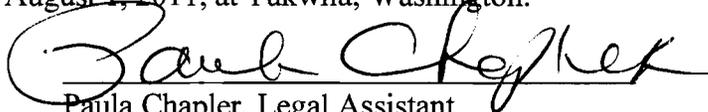
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 1, 2011, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

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