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No. 68008-1
(Consolidated with No. 68009-9)

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

DOUG KRUGER, a single man,

Plaintiff/Respondent,

v.

MICHAEL MOI,

individually as Personal Representative of the Estate of Sherry Moi,

Defendants/Appellants.

KRUGER'S RESPONDENT'S BRIEF

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2012 SEP -3 11:41 AM
STATE OF WASHINGTON
COURT OF APPEALS
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I. INTRODUCTION

This matter arises out of a failed business agreement between the Appellant, Michael Moi (Moi), and the Respondent, Douglas Kruger (Kruger). The underlying business agreement involved purchase of a piece of property. The parties were to purchase the property then short plat the property, dividing into two separate parcels. Then, each party would take one of the divided pieces of property. Moi breached the terms of the agreement and concedes that he has not made payments as required under the agreement for nearly the past decade. As a result of the failed agreements, Kruger has been forced to file two separate lawsuits against Moi. Both have resulted in judgments against Moi. Moi appeals the trial court's decisions finding him liable for the damages that he has caused.

II. ASSIGNMENTS OF ERROR

- A. Kruger does not assign error to the trial court's rulings.
- B. Kruger requests that this Court remand this matter solely for entry of an award of his remaining attorney fees and costs pursuant to the trial court's request for guidance in its Order dated May 25, 2012.

III. STATEMENT OF THE CASE

A. Overview

This consolidated appeal arises out of a joint venture to purchase a piece of property. CP (06) 3-10; (09) 3-7. The property was a large

residential lot which was to be divided into two residential building lots. CP (06) 1821. At the time of the purchase, an old house straddled what would be the dividing line between the two properties. *Id.* The parties agreed that the house would be demolished, the property divided into two, with Kruger taking one parcel and Moi taking the other. *Id.*

In 1990, the parties hired attorney Greg Lawless to draft the joint venture agreement. CP (09) 891-906. Kruger signed the agreement and forwarded his signed copy to Moi so that Moi could sign. CP (09) 655, 891-906, 927-29. The joint venture agreement contains the following provision:

23. Attorneys' Fees: Should any litigation be commenced between the parties hereto or their representatives or should any party institute any proceedings in bankruptcy or similar court which has jurisdiction over any other party hereto or any or all of his or its property or assets concerning any provision of this Agreement or the rights and duties of any person or entity in relation thereto, the party or parties prevailing in such litigation shall be entitled, in addition to such other relief as may be granted to a reasonable sum as and for this or its or their attorneys' fees and court costs in such litigation which shall be determined by the Court in such litigation or in a separate action brought for that purpose.

CP (09) 901(attached as Appendix A).

Over the years, Moi made repeated assurances to Kruger that he would get Kruger a copy of the signed agreement. CP (09) 655, 891-906, 927-29. However, he never did. *Id.*

Through the course of these litigated matters, Moi denied the existence of the agreement, Moi falsely claimed that it was in fact Kruger who would not sign the agreement because Kruger was somehow concerned that his ex-wife would claim an interest in the property. *See* CP (09) 927-29. Moi's representations were provably false based on clear documentation. *Id.* Kruger's ex-wife voluntarily relinquished any claim to the property *before* the property was in fact purchased. *Id.*

Nevertheless, Moi accepted the benefits of the contract and proceeded with the arrangement. *See* CP (09) 1028-31. Kruger fully believed that the contract was valid and binding. This understanding is reflected in the letter from the parties' attorney, Mr. Lawless, in 1994 providing guidance as to the terms and conditions of the contract as though the contract was a valid and binding agreement. CP (09) 1031.

B. Moi Breached the Contract.

Over the intervening years, the property was rented to third-parties and those rental proceeds applied towards the mortgage payment. CP (09) 857-61. In 2003, Moi approached Kruger with a proposition whereby Moi would live in the house and pay the mortgage. CP (09) 57-59. It was Moi's responsibility to pay the mortgage. *Id.*

However, in the fall of 2005, Kruger applied for a consumer loan. CP (09) 57-59; 857-61. He was declined. *Id.* At that time, Kruger

believed he had impeccable credit. *Id.* It came as a surprise to him to learn that his credit had actually been severely damaged because the loan secured by the property had been in default. *Id.* In fact, the underling note had not been paid for months. *Id.* The taxes had not been paid for a substantial period of time. *Id.* When Kruger inquired further, he learned that Moi had not been making any of the payments on the property. *Id.* Kruger, on his own, paid all of the past-due mortgage payments and cured the default. *Id.* Kruger, on his own, paid all of the back taxes to avoid the potential tax foreclosure. *Id.* Kruger, on his own, proceeded to have the house demolished in accordance with the parties' original agreement. *Id.*

Kruger demanded that Moi pay his share of these expenses and sign the short plat documents allowing the properties to be divided. *Id.* Thus, if Moi had simply lived up to his end of the bargain in 2005, there would have been no litigation between the parties at all. *See id.*

C. 2006 Lawsuit

As a result of Moi's recalcitrance and steadfast refusal to pay his share of the expenses for the joint venture, and his refusal to sign over the transfer documents allowing for the short plat of the property, Kruger was left with no other alternative but to file suit. CP (06) 3-10. Kruger filed suit on October 3, 2006, seeking his out of pocket expenses and seeking an

order compelling Moi to transfer the property in accordance with the parties' 1990 agreement. *Id.*

Moi was served, but he failed to appear or otherwise defend. CP (06) 11-23, 32. As a result, Kruger obtained a default judgment and an order requiring Moi to execute the appropriate documents to allow the property to be divided. CP (06) 11-23. Moi steadfastly refused. *See* CP (06) 59-64.

Instead, Moi hired his *first* attorney who filed an order to show cause and motioned the trial court for an order setting aside the default judgment and order. CP (06) 55-58. Moi claimed that he had never been served with the underlying lawsuit. *Id.* Moi ultimately conceded that his sixteen year old daughter had been served with a copy of the summons and complaint. *Id.* Moi conceded that as of December of 2006, he "found a piece of paper at his shop with an attorney's name and address on it, and his daughter told him that some guy had dropped it off back in October." CP (06) 56. Moi took no action to appear in the lawsuit. *See* CP (06) 51-52.

Later, Moi undertook a series of motions to set aside the default orders and default judgment. *See* CP (06) 55-58, 1828-34. Those motions were denied. *See* CP (06) 51-52, 1856-57. Moi's essential argument was two-fold. *See* CP (06) 55-58, 1828-34. First, he claimed that his sixteen

year old daughter was not a person of suitable age. *Id.* Second, he claimed that the address of service was not his residence. *Id.* Kruger was able to present the court with multiple declarations attesting to the fact that the place of service was in fact Moi's residence. *See* (06) 1818-27. Moi's motion to set aside the default order was denied. CP (06) 51-52. Moi never presented a defense to the underlying lawsuit. *See* CP (06) 55-58, 1828-34.

The court found that service was had on Moi by serving a person of suitable age and discretion at the defendant's usual place of abode. *Id.* The court acknowledged that the defendant admitted that he received actual notice of the lawsuit no later than December of 2006 and yet, he undertook no further inquiry until November of 2007. *Id.* The court further found the defendants took no further action with respect to the lawsuit from November of 2007 to November of 2008 before filing any motion to vacate the default judgment. *Id.* The court found that the defendants offered no defense whatsoever to the underlying lawsuit. *Id.*

Amazingly (and what has become a common practice of Moi and his various attorneys), Moi requested an award of attorney fees pursuant to CR 11 based on all the problems that he himself had created. CP (06) 55.

Thereafter, Moi refused to comply with the court's order requiring him to sign the property transfer documents to allow the property to be

divided and allow the parties to go their separate ways. *See* CP (06) 59-64. As a result, Kruger was forced to file a motion to enforce the judgment, appoint a third-party trustee to convey the real estate and proceed with the division of the property. *Id.* Contemporaneous with that motion, Kruger requested the court to enter an order of contempt against Moi based on his ongoing recalcitrance. *Id.* The trial court appointed a third-party trustee to convey the property and found Moi in contempt of court and ordered him to pay the costs associated with the appointment of that third-party trustee. CP (06) 75-76. To date, Moi remains in contempt of court based on his willful violations of the orders from the 2006 action. *See id.* He has not appealed this Order. *See Appellant's Brief.*

D. 2009 Lawsuit

When Kruger originally filed his lawsuit in 2006, he pled very specific relief which would have encompassed only the damages caused by Moi up to the date of the filing of his 2006 lawsuit. CP (06) 3-10. However, as a result of Moi's ongoing recalcitrance and refusal to comply with the terms of his agreements and court orders, Kruger continued to suffer additional damages. *See* CP (09) 3-7. As a result, he was forced to file a second lawsuit to cover those ongoing damages. *Id.*

In Kruger's 2009 lawsuit, he requested broad-ranging relief for his damages. *Id.* Keep in mind that Kruger was the only person who had

been making payments on the loan, payment of taxes and maintenance. *Id.* Just as in the 2006 lawsuit, Moi was served. CP (09) 24. Moi failed to appear and defend. *See* CP (09) 50. As a result, Kruger moved the court for entry of a default order. *See* CP (09) 31-34. A default judgment was entered against Moi on February 23, 2010. CP (09) 50. On April 30, 2010, Kruger moved to amend the default judgment. CP (09) 52-56. That motion was granted by the court. CP (09) 279-80. As a result, as of May 3, 2010, a default judgment had been entered against Moi. CP (09) 279-80.

At the time that the May 3, 2010, default judgment was signed, the court awarded Kruger his fees and costs incurred to that date, in the total amount of \$34,613.43. CP (09) 1133-38. Kruger later sought a separate award for his remaining fees and costs at the trial court incurred since the entry of the amended default judgment, from approximately June 1, 2010, to the present, pursuant to the parties' contract, CR 54(d)(2), and equitable principles. CP (09) 1335-40. Kruger submitted to the court a spreadsheet outlining his fees and costs incurred during this period, in the total amount of \$116,084.96. CP (09) 1366-1472. At the time that Kruger sought his remaining fees and costs, this matter had been appealed. CP (09) 1354-55. The trial court requested guidance from this Court on the issue of Kruger's remaining trial court fees and costs. CP (09) 1632.

E. Allegations by Moi that He was Represented by Counsel

Moi has alleged that he was represented by counsel and, as such, that he should have received notice of the motions pending in the 2009 action.¹ CP (09) 516-43. However, a review of the record reveals that no attorney appeared on behalf of Moi in the 2009 lawsuit. *See* CP (09) 1350. In particular, Moi now claims that he was represented by attorney Michael Malnati. CP (09) 516-43. It is undisputed that Mr. Malnati did not file any formal appearance. *See* CP (09) 1350. It is undisputed that Mr. Malnati never advised the court that he was appearing on behalf of Moi. *See* CP (09) 1350. Instead, Moi argued that Mr. Malnati had given an “informal appearance.” CP (09) 516-43.

Apparently, Moi was attempting to obtain “hard money” financing against some of his property purportedly to pay Kruger the money he owed. *See* CP (09) 123. Mr. Malnati sent an email to Kruger’s attorney wherein he indicated that his client, the hard money lender, asked him to look into Moi’s situation. *Id.* Conspicuously absent from Mr. Malnati’s email is any indication that he represented Moi. *Id.*

As Moi later attempted to argue that Mr. Malnati was his attorney, thus requiring notice, Moi offered the declaration of Mr. Malnati. CP (09) 119-126. Again, conspicuously absent from Mr. Malnati’s declaration is

¹ Moi does not allege that he was represented in February 2010, when the default was entered.

any statement from Mr. Malnati indicating that Moi was in fact his client or that he advised counsel or the court that he was appearing on Moi's behalf. *Id.* Instead, Mr. Malnati only refers to his "client" as Direct Lending Group, the hard-money lender. *Id.*

Thereafter Moi, in a reply brief, submitted a billing statement from Mr. Malnati.² CP (09) 1037-38. The first time entry in the billing statement is dated May 4, 2010. CP (09) 1037. This first time entry is dated five days *after* Kruger filed his motion to amend the default judgment. CP (09) 52-56, 1037. Moreover, the first-time entry of May 4, 2010 is also one day *after* the court entered the default judgment. CP (09) 279-80, 1037. Moi now asserts that Mr. Malnati's billing statement indicates a past-due balance and that this somehow establishes representation. *See Appellant's Brief.* But again, there is nothing presented to the trial court indicating that these were for services provided by Mr. Malnati on behalf of Moi in this matter. *See* CP (09) 1350.

Again, this could have simply been rectified had Mr. Malnati filed a formal appearance. *Id.* At the very least, Moi could have obtained a declaration from Mr. Malnati clearly indicating that he represented Moi and not the "hard money lender." *See* CP (09) 119-126. In contrast, Kruger submitted the declaration of counsel wherein counsel clearly

² This declaration was submitted in a reply brief instead of the original moving papers.

indicated that Mr. Malnati had advised that he represented the hard money lender and at no point in time did he represent that he was appearing on behalf of Moi in the Kruger lawsuit. CP (09) 143-47. Mr. Malnati never filed a formal appearance in the 2009 lawsuit at any point. CP (09) 1350-55. Despite knowing of the default judgment, Mr. Malnati took no steps whatsoever or on behalf of Moi to set aside the default judgment. *Id.*

F. Moi Filed Bankruptcy in an Attempt to Avoid His Obligations to Kruger.

Knowing full well of the default judgment, Moi took no steps whatsoever before the trial court. *Id.* Instead, Moi hired his *second* attorney who filed for bankruptcy protection under cause number 10-15781. *See* (09) 691. Then, not only did Moi file bankruptcy, he also filed an adversary proceeding under cause number 10-01550-MLB, wherein he filed suit against Kruger. *Id.* Moi additionally filed suit against the undersigned, Kruger's attorney of record, wherein he alleged RICO violations, mail fraud, wire fraud, perjury, violations of 28 USC §§§ 1981, 1982 and 1983. *See* CP (09) 632-38, 710-34.

Moi based his perjury charge on claims that the undersigned had misrepresented facts to the trial court when obtaining a writ of execution while executing on the first judgment. *Id.* The basis of this allegation was that the undersigned signed a declaration indicating that Kruger's counsel

believed that Moi had insufficient personal assets to satisfy the judgment. *Id.* Moi argued that Kruger and the undersigned should have known that Moi had personal assets sufficient to satisfy the judgment. *Id.* However, the undersigned submitted a declaration indicating that the belief was based on Moi's own affidavit of indigency. *See* CP (09) 1694-96. By way of background, Moi was charged with burglary in the second degree in King County Superior Court Cause No. 07-C-05415-1 SEA. *Id.* He appealed his criminal conviction. *Id.* In doing so, he filed an affidavit of indigency indicating that he had no money to pay for an attorney.³ *Id.* Thus, in reliance on Moi's own sworn affidavit of indigency, Kruger's attorney filed a declaration indicating that he did not believe Moi had sufficient personal assets to satisfy the judgment. *Id.*

It was Kruger's belief and the undersigned's belief that the adversary proceeding initiated in bankruptcy was a frivolous filing, meant to harass and further complicate these matters. CP (09) 811-20. For example, Moi served discovery requests on the undersigned seeking "All documents maintained by the undersigned in the practice of law." *See* CP (09) 997-98. The discovery requests sought production of Kruger's attorney's file. *Id.* Kruger was forced to move for a protective order and

³ This affidavit of indigency ultimately conflicted greatly with his subsequent bankruptcy filing.

motion to quash the subpoena. *Id.* The bankruptcy court readily agreed that the discovery was improper. *Id.*

Thereafter, Kruger and Kruger's counsel were forced to file a motion for summary judgment seeking dismissal of the frivolous adversary proceeding predicated on RICO violations, perjury, wire fraud, and violations of civil rights, etc. CP (09) 710-34. Kruger requested sanctions pursuant to Bankruptcy Rule 9011.⁴ *Id.* The bankruptcy judge promptly granted Kruger's motion for summary judgment dismissing the RICO, perjury, and civil rights causes of action. CP (09) 992-93.

Although the bankruptcy court did not award sanctions, it found the causes of action alleging various misconduct "were, at best, dicey and not well conceived or thought through." CP (09) 996. The bankruptcy court went on to "strongly admonish" Moi's counsel. *Id.* The court stated, "So although I'm not awarding sanctions, I'm not happy about the situation and I wouldn't expect to see a complaint like this in a similar setting before." *Id.* The court further stated, "I think it's perilously close to a situation where I would have, with just a very slight breeze over the-- over the line further, have awarded Rule 11 sanctions, especially on the claims against Mr. Wathen." CP (09) 995.

⁴ Bankruptcy Rule 9011 is the equivalent to State Court CR 11.

Thereafter, Kruger filed his second motion for summary judgment, requesting the bankruptcy court to set the amount owed by Moi to Kruger for purposes of the bankruptcy proceeding, requesting an award of attorney fees pursuant to the contract, and dismissing Moi's claim of preference.⁵ CP (09) 710-34.

Kruger's motion for summary judgment was set over for hearing before the bankruptcy court on May 19, 2011. *See* CP (09) 154.

Just before the hearing of Kruger's summary judgment in the bankruptcy court, Moi voluntarily dismissed his bankruptcy proceeding in order to avoid the bankruptcy judge from ruling on Kruger's motion. *See* CP (09) 1201. Moi moved to dismiss his bankruptcy proceeding on May 13, 2011. *Id.* The court confirmed the dismissal on May 31, 2011. *Id.* As a result, the entire bankruptcy proceeding was a nullity. *Id.* Nevertheless, Kruger was forced to incur substantial fees and expenses in the bankruptcy matter and defending himself against Moi's adversary claims of RICO violations, perjury, civil rights violations, etc. *See* CP (09) 811-20.

G. Moi Filed, then Struck, His Initial Attempt to Set Aside the Default in the 2009 Lawsuit.

⁵ Bankruptcy rules allow for avoidance of a judgment, if entered within ninety days of the filing of a bankruptcy, unless the estate is solvent. In this particular matter, Moi's estate was solvent.

While still in bankruptcy, Moi hired a *third* attorney. *See* CP (09) 1351. On May 6, 2011, Moi obtained an order to show cause requesting the trial court to set aside the default judgment. *Id.* As Moi has alleged in other matters, he asserted that he had not been served. *See* CP (09) 83-111. He alleged that he was not the person described in the service papers. *Id.* Instead, he argued that he was of Norwegian decent and fair skinned. *Id.*; *compare to* CP (09) 931 (attached as Appendix B). Moi also requested CR 11 sanctions. *See* CP (09) 83-111. The purported basis for the CR 11 sanctions were virtually identical to the allegations asserted by Moi's other attorney in the bankruptcy matter. *Id.* As set forth above, the bankruptcy judge strongly admonished Moi and his attorney for making such baseless allegations. CP (09) 99-96. Nevertheless, Moi, through yet another attorney, asserted the same baseless claims of misconduct. *See* CP (09) 83-111. The motion for order to show cause was set for May 17, 2011. *See* CP (09) 1351.

Kruger was forced to file a substantial Response in Opposition to the Order to Show Cause in light of the multiple representations made by Moi, Moi had not obtained relief from the bankruptcy stay and that there was a pending motion for summary judgment in the bankruptcy matters. *See* CP (09) 1351.

In Moi's motion for order to show cause, he made multiple representations which were easily disproven. *See* CP (09) 83-111. For example, Moi claimed that Kruger moved forward to short plat the property without Moi's knowledge or consent. *Id.* However, Kruger was able to present evidence indicating that the short plat had already been completed, with the exception of filing, twenty years earlier, in October 1990 before the property was even purchased. CP (09) 134-42. Moi claimed that he was unaware that the house which straddled the property line was being demolished. *See* CP (09) 83-111. Kruger provided a declaration and his letter dated January 14, 2006, documenting the numerous times by phone and in person the he attempted to discuss with Moi concerning the demolition of the house. CP (09) 134-42. Moi claimed that Kruger was refusing to sign over paperwork to short plat the property. *See* CP (09) 83-111. Kruger submitted his declaration pointing out that he has steadfastly agreed and made multiple representations to that effect in both the bankruptcy matter and the state court matters. CP (09) 134-42.

On the eve of the order to show cause hearing, Moi filed an ex parte motion striking the show cause hearing. CP (09) 1352. Thus, Moi's motion was never heard and its filing was a nullity. *Id.*

H. Moi Waited Another Four Months Before Taking Any Action to Set Aside the Default Judgments.

Having voluntarily dismissed his first motion for order to show cause, Moi waited for an additional four months before filing his second motion for order to show cause. *See* CP (09) 1352. This second motion for order to show cause revamped his prior arguments and attempted to correct his prior misrepresentations concerning the history of the parties' dispute. *See* CP (09) 516-43. The motion for order to show cause was noted for August 30, 2011. *Id.* Again, Moi requested CR 11 sanctions based on the same allegations which had previously been dismissed by the bankruptcy court and that he had voluntarily stricken in the first order to show cause proceeding. *Id.* So, Moi had knowingly waited for sixteen months prior to bringing his motion to set aside the default orders. *See* CP (09) 1350-53. The court denied this Motion. CP (09) 1108-11 (attached as Appendix C).

In the end, it is Kruger who has born all of the financial responsibility for this joint venture for almost the past decade. *See* CP (06) 3-10; (09) 3-7. Moi has paid virtually nothing towards the joint venture, payment of taxes, maintenance, etc.⁶ CP (09) 57-59; 857-61.

⁶ This was with the exception of a two-month period shortly before Moi's second motion for order to show cause. After the order to show cause hearing, Moi again stopped making any further payments.

Finally, Moi admits that he has breached the contract and that he owes Kruger damages. *See Appellant's Brief.*

Moi has now hired his *fourth* attorney who is again making the same claims of misconduct, which have been flatly rejected by the trial court and rejected by the bankruptcy court. *Id.*

IV. ARGUMENT

A. **Moi's Statement of the Case, and Brief, Should be Partially Stricken.**

Moi's Brief, particularly his Statement of the Case, should be stricken where it alleges facts unsupported by the record. RAP 10.3(a)(5); *see also Barnes v. Wash. Natural Gas Co.*, 22 Wn. App. 576, 577, 591 P.2d 461 (1979). RAP 10.3(a)(5) is clear that in his Statement of the Case, Moi was required to reference the record for each factual statement. *See* RAP 10.3(a)(5). Moi failed to do this. As a result, the Court should partially strike Moi's Brief.

B. **Standard of Review**

The trial court's ruling on Moi's motion to set aside default judgment is purely discretionary. A decision to grant or deny a motion to vacate a default judgment is within the *sound discretion of the trial court*. *Morin et al. v. Burris et al.*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007); *Graham v. Yakima Stock Brokers, Inc.*, 192 Wn. 121, 126, 72 P.2d 1041

(1937); *Shepard Ambulance, Inc., et al. v. Helsell, Fetterman, Martin, Todd & Hokanson, et al.*, 95 Wn. App. 231, 238, 974 P.2d 1275 (1999); *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991). The trial court's decision should not be disturbed on appeal unless it abused its discretion. *Leen*, 62 Wn. App. at 478.

Evidence is substantial, *i.e.*, sufficient, to support a damage award if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Shepard Ambulance, Inc., et al.*, 95 Wn. App. at 242.

C. The Trial Court Properly Denied Moi's Motion to Set Aside the 2010 Default Judgments.

When considering a motion to set aside a default judgment, the trial court considers four factors: 1) the existence of a valid defense to the asserted claim; 2) the movant's reasons for the failure to appear; 3) the movant's diligence in seeking relief after the notice of default; and 4) the effect of vacating the judgment on the non-moving party. *Id.* at 238; *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

In this matter, the trial court did not abuse its discretion because Moi failed to meet his burden that the default judgments should be set aside. The Court should deny Moi's appeal.

D. Moi Failed to Exercise any Diligence in Seeking Relief from the Default Judgments.

Due diligence after the discovery of a default judgment contemplates the prompt filing of a motion to vacate. *Shepard Ambulance, Inc., et al.*, 95 Wn. App. at 231. In this matter, Moi offered no explanation, excuse, or other argument to justify his taking no action for more than 16 months after learning of the default judgment.

Unexplainable delays in taking action after being notified of the lawsuit are generally construed against a finding of good cause justifying setting aside a default. *Smith*, 127 Wn. App. at 113. It is well established that in order to establish good cause necessary to set aside a default, the party must demonstrate excusable neglect. *Estate of Stevens*, 94 Wn. App. 20, 971 P.2d 58 (1999). Doing nothing for three months after entry of default order is not acting with due diligence and does not justify setting aside a default. *Id.*

In stark contrast, other courts have held that a defendant acted with due diligence when he moved to vacate the following day. *Cammarano v. Longmire*, 99 Wn. 360, 361, 169 P. 806 (1918); *Hardesty v. Stenchever*, 82 Wn. App. 253, 257, 917 P.2d 577 (1996) (seven days); *Canam Hambro Sys., Inc. v. Horbach et al.*, 33 Wn. App. 452, 453, 655 P.2d 1182 (1982) (twenty three days). As these cases illustrate, immediate action is required on a part of the defaulting party. If three

months is not diligent enough, then one year certainly does not justify good cause for setting aside a default.

In this case, Moi did nothing for more than sixteen months. For purposes of setting aside, Moi fails to show good cause by establishing excusable neglect and due diligence. Moi offers no evidence for this Court to consider what constitutes excusable neglect, nor does he establish or even argue due diligence. To the contrary, Moi has presented no evidence and/or argument of excusable neglect and has not demonstrated due diligence. As a result, this Court should deny Moi's appeal.

What constitutes a reasonable time to request relief from a default judgment is determined by examining the critical period of time between when the party became aware of the order and when the party filed the motion to vacate it. *Topliff v. Chicago Ins. Co.*, 201, 30 Wn. App. 301, 122 P.3d 922 (2005). It has long been the status of the law that a party must show diligence on his or her part as to the reason he did not proceed earlier. *Coon v. Mason*, 24 Wn. 94, 64 P. 182 (1901). Thus, for more than one hundred years this has been the law in the State of Washington. Yet, Moi presents no evidence or argument showing any diligence on his part whatsoever. He admits that he knew of the default order for more than

sixteen months before taking any action whatsoever to proceed to correct any alleged irregularities.

Courts from other jurisdictions have also reviewed what constitutes a reasonable period of time for exercising due diligence. In *Travelers Ins. Co. v. Liljeberg Enter., Inc.*, 38 F.3d 1404 (5th Cir. 1994), the court held that a three-month delay was an unreasonable time. In *Fed. Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764 (8th Cir. 1989), the court held that a ten-week delay in seeking relief from judgment was an unreasonable delay. In *Sec. Mut. Cas. Co. v. Century Cas. Co.*, 621 F.2d 1062 (10th Cir. 1980), the court held that a delay of one hundred and fifteen days was unreasonable. In *Cent. Operating Co. v. Util. Workers of Am., AFL-CIO*, 491 F.2d 245 (4th Cir. 1974), the court held that a four-month delay was inexcusable dereliction. In *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 205 (5th Cir. 2003), the court held that a fourteen-month delay was unreasonable. In this particular matter, Moi concedes that he waited for sixteen months before seeking an order of the judgments. He offers no excuse or explanation for this delay.

His only argument is that somehow the bankruptcy filing essentially tolled his obligation to act with due diligence. First, there is no authority cited for this proposition. Second, by voluntarily non-suiting his bankruptcy, it is as though the bankruptcy had never been filed. The

effect of voluntary dismissal is to render the proceedings a nullity and to leave the parties as if the action had never been brought. *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 158 P.3d 1271 (2007). Thus, the voluntary dismissal of Moi's bankruptcy petition is as though for purposes of determining whether or not Moi acted with due diligence. At any point in time, Moi could have simply filed a motion in the bankruptcy matter seeking relief from stay in order to allow him to proceed in state court to set aside the default judgment. In reality, Moi was trying to discharge his obligations to Kruger in their entirety. When it became readily apparent that he would not be able to avoid his obligations in the bankruptcy matter, and he was facing a summary judgment hearing on the issue, Moi strategically chose to non-suit his bankruptcy matter.

Moreover, any motion to vacate or modify a judgment on the basis of fraud "must be commenced within one year after the judgment or order was made..." RCW 4.72.030. In the decision of *Dalton v. State*, the court held that "the critical considerations usually are whether the claim substantiated and not merely asserted at large and whether the original action the victim had pursued reasonable precautions against deception." *Dalton v. State*, 130 Wn. App. 653, 664, 124 P.3d 305 (2005), citing Restatement (second) of Judgments § 70(2)(c) (1982). The party requesting relief pursuant to CR 60(b)(4) must submit proof of misconduct

that is clear, cogent and convincing. *Id.* at 665, citing *People's State Bank v. Hickey*, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989); *see also Lindegren v. Lindegren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). A party asserting fraud must prove by clear, cogent and convincing elements the following nine elements: 1) representation of existing fact; 2) materiality; 3) falsity; 4) defendant's knowledge of the falsity; 5) intent that the defendant should be acted upon by the plaintiff; 6) ignorance of the falsity; 7) plaintiff's reliance on the truth of the representation; 8) plaintiff's right to rely on it; and 9) damages suffered by the plaintiff. *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008). In this particular case, Moi's claims of fraud are "merely asserted at large and do not establish that the trial court abused its discretion."

In this matter, Moi conceded that he knew of the February 16, 2009, default judgment as early as April 2010. Yet, he let more than one year pass without taking any action. Moi failed to offer any excuses for this. Moi's conduct constitutes inexcusable neglect and delay. It cannot be stated that Moi acted with due diligence and in good faith attempting to set aside the default judgments.

E. Moi Failed to Present any Defense to Kruger's Claims.

In his motion to set aside the default judgments, Moi failed to substantively defend against Kruger's claims. In fact, Moi has no defense

to Kruger's claims. Moi admits that he breached the parties' contract and that he owes Kruger money. Moi cannot meet the first element to set aside a default judgment.

F. Moi was Properly Served, and Failed to Appear.

In Washington, it is well established that a facially correct return of service is presumed valid. *Leen*, 62 Wn. App. at 478. The burden is on the individual attacking service to show by clear and convincing evidence that service was improper. *Id.*; see also *In re Dependency of AG*, 93 Wn. App. 268, 276, 968 P.2d 424 (1998). At the trial court, Moi, as he has done in every other matter, has alleged that he was not served. Based on the substantial evidence presented to the trial court, the trial court concluded that Mr. Moi had in fact been served. CP (09) 1108-11 (attached as Appendix C). For purposes of this appeal, Moi now concedes that he was in fact served. However, in doing so, he fails to present any evidence justifying why he did not appear. Keep in mind that Moi was originally served on October 18, 2009. CP (09) 932. He took no action whatsoever to even acknowledge the lawsuit until well after the default had been entered.

Moi claims that he appeared. However, this is not supported by fact or law. It is undisputed that on receiving service, Moi failed to file a notice of appearance. It is undisputed that Moi failed to answer, demur,

make an application for an order therein, or give Kruger written notice of his appearance. See *Shreve v. Chamberlin*, 66 Wn. App. 728, 732, 832 P.2d 1355 (1992), citing in part RCW 4.28.210. It is undisputed that Moi first filed a notice of appearance in this matter on April 21, 2011. CP (09) 1351.

Moi claims that he appeared through Mr. Malnati. Moi's alleged appearance is predicated on two emails sent by Mr. Malnati. However, these emails do not constitute an appearance, and the facts demonstrate that no appearance was made. Whether a party has "appeared" for purpose of invoking the right to notice is a question of fact that should be narrowly construed. *Smith v. Arnold*, 127 Wn. App. 98, 107, 110 P.3d 257 (2005).

The *Smith* Court further stated:

[I]t is a disservice to the legal system to distort the meaning of a concrete term such as "appearance" in order to provide a mechanism to save a party from a default judgment. Efficient court management and reliability of judicial process is enhanced by court records which disclose the critical procedural actions of the parties — such as the entry of an appearance. Requiring that there be an appearance by communication with the trial court, not the opposing party, "avoids ethical entanglements, misunderstandings, and deception; it crystallizes the circumstances under which there is a default; and it imports a clear meaning to the party to be charged...."

Id. at 107-08 (internal citations omitted).

An informal appearance must be supported by evidence of actions manifesting an unquestionable intent to appear and defend the matter in court. *Id.* at 105. A party will not be considered to have appeared informally if the plaintiff could reasonably harbor illusions about whether the party intended to defend the matter. *Id.*

In this matter, Mr. Malnati made it abundantly clear during his telephone conferences with Kruger's counsel that Mr. Malnati was representing a hard money lender, and not the Mois. Mr. Malnati made it abundantly clear that his purpose was to secure a first position for his client, a hard money lender, so that it could loan money and obtain a security interest ahead of all other creditors. The emails from Mr. Malnati state that his client is a hard money lender. CP (09) 123. At no point do any of the emails from Mr. Malnati state that the Mois were his clients. *Id.* Conspicuously absent from the declaration of Mr. Malnati is that he in fact represented the Mois. *Id.* The title report obtained by Mr. Malnati was from his client, a hard money lender. Mr. Malnati failed to produce any retainer agreement, correspondence with the Mois, or any other documents indicating that he had been retained by the Mois. The evidence before the trial court was only that Mr. Malnati represented a hard money lender. *Id.*

Even if Mr. Malnati did in fact represent that he had been retained by the Moises, Moi still failed to informally appear. An informal appearance requires some communication with the court after the action is filed. *Smith*, 127 Wn. App. at 108. There was no evidence of any contact by or on behalf of Moi with the trial court whatsoever prior to Moi's counsel filing a notice of appearance on April 21, 2011. Moi failed to appear after he was served.

G. Kruger Would Suffer Substantial Prejudice if the Default Judgment is Vacated.

Kruger acted with the utmost good faith in the underlying agreement and complied with all of his obligations in the joint venture with the Defendants. When the Defendants defaulted, they caused substantial damage to Mr. Kruger's credit. If the Court vacates the motion for default, this will essentially force Kruger to bear the entire financial burden of this venture for the past six years.⁷

Moi's entire adversary proceeding in the bankruptcy court as well as all of the claims asserted by Kruger in the main portion of the Chapter 13 filing are predicated on the default judgment. Moi has forced Kruger to extensively litigate throughout the bankruptcy matter incurring tens of

⁷ Moi has already filed a notice of indigency in another matter. As a result, in order to keep the property out of foreclosure, Kruger will be forced to make the payments or suffer the consequences of the defaulted note held by Washington Mutual.

thousands of dollars in legal fees. At present, the legal fees are in excess of \$70,000.00. All of Moi's arguments against Kruger in the bankruptcy matter are predicated on the default judgment. Stated another way, if the default judgment had never been entered, there would have been no action available by Moi against Kruger in the bankruptcy matters. As a result, if this Court sets aside the default judgment, Kruger will bear a substantial harm in the form of incurring substantial legal fees. This will result in substantial prejudice to Kruger who has already had to bear the entire financial burden for nearly a decade at this point. Under these circumstances, the Court should not set aside the default judgment because of the enormous burden placed on Kruger.

H. This Court Should Remand Solely for the Entry of Kruger's Fees and Costs at the Trial Court.

The only error that Kruger assigns to the trial court is its May 29, 2012, order denying fees *without prejudice*. To be more accurate, the trial court reserved on this issue once this matter went on appeal, and requested guidance from this Court. CP (09) 1632. The trial court had previously awarded Kruger fees and costs in the February 16, 2007, and May 3, 2010, default judgments. CP (06) 11-23; (09) 1133-38. This Court should rule that pursuant to the contract, and equitable principles, Kruger is entitled to all of his fees and costs incurred as a result of Moi's breach. This Court

should further confirm the trial court's prior fee awards, and remand for the entry of Kruger's total fees and costs from June 1, 2010, to the present.

"Under the American rule, attorney fees are recoverable only when authorized by private agreement by the parties, or statute, unless an equitable exception exists." *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 79, note 2, 272 P.3d 827 (2012), citing *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am.*, 456 U.S. 717, 721, 102 S. Ct. 2112, 72 L. Ed. 2d 511 (1982).

In this matter, the underlying contract between the parties provides for attorney fees and costs. The relevant provision states:

Attorneys' Fees: Should any litigation be commenced between the parties hereto or their representatives or should any party institute any proceedings in bankruptcy or similar court which has jurisdiction over any other party hereto or any or all of his or its property or assets concerning any provision or this Agreement or the rights and duties of any person or entity in relation thereto, the party or parties prevailing in such litigation shall be entitled, in addition to such other relief as may be granted to a reasonable sum as and for his or its or their attorneys' fees and court costs in such litigation or in a separate action brought for that purpose.

CP (09) 901 (attached as Appendix A).

This provision is clear that Kruger is entitled to all of his attorney fees and costs resulting from Moi's breach of the contract and ensuing

litigation regarding the same. At the time that the May 3, 2010, amended default judgment was signed, the trial court properly awarded Kruger his fees and costs incurred to that date, in the total amount of \$34,613.43. CP (09) 1133-38. Kruger is entitled to a separate award for his remaining fees and costs incurred since the entry of the amended default judgment, from approximately June 1, 2010, to the present, pursuant to the parties' contract, and CR 54(d)(2). *See* CR 54(d)(2). Kruger submitted to the trial court a spreadsheet outlining his fees and costs incurred during this period, in the total amount of \$116,084.96. CP (09) 1366-1472.

Equitable principles also support that Kruger is entitled to his fees and costs incurred as a result of Moi's breach. Moi breached the contract, and then forced Kruger into vexatious and protracted litigation. Kruger was forced to engage in this litigation while at the same time forced to make payments on the parties' loan, which he cannot satisfy due to Moi's breach. Kruger should be able to recover all of his damages as a result of Moi's continuing unreasonable conduct. A fee award can be of no surprise to Moi. Moi knew that the parties' contract provides for fees and costs in the event of a breach and ensuing litigation, and Kruger's complaints in this matter clearly requested all of his allowable fees and costs. CP (06) 3-10; (09) 3-7.

The trial court did not abuse its discretion in twice awarding Kruger his fees and costs. When an amount owing is a sum certain, *e.g.*, in cases with a promissory note or other contract, the trial court may award damages plus costs without making factual findings or legal conclusions. *Smith et al. v. Behr Process Corp.*, 113 Wn. App. 306, 333-34, 54 P.3d 665 (2002). Kruger is entitled to his fees and costs pursuant to contract, statute, and equitable principles. This Court should affirm the trial court's prior fee awards, and remand solely for the entry of Kruger's remaining fees and costs incurred at the trial court.

I. Moi's Arguments are Without Merit.

1. Moi Attempts to Distract this Court with False Allegations of Fraud, Misrepresentation, and/or Misconduct.

Moi makes false allegations of fraud, misrepresentation, and/or misconduct to attempt to distract from his own wrongdoing, and the resulting damages to Kruger. Moi admits that he owes Kruger money. As the trial court found, there was no evidence of fraud, misrepresentation, and/or misconduct on the part of Kruger or his counsel. Kruger properly sought entry of the damages included in the May 3, 2010, amended default judgment. Kruger outlined and provided supporting documentation for these damages, and the trial court in its discretion awarded them.

Kruger presented the following outline to the trial court:

• Total money paid out of pocket through original default judgment	\$141,379.59
• Amounts incurred on property since judgment	\$6,386.69
• Principle on Chase/WaMu loan	\$160,000.00
• Less judgment obtained in No. 06-2-32029-8	(\$92,862.72)
• Total judgment requested	\$214,903.56

CP (09) 58.

In this judgment request, Kruger sought all damages resulting from Moi's continuing breach that were not included in the first default judgment. Kruger was entitled to all money paid out of pocket, and incurred on the property, including the following: past due mortgage, insurance, utility, and tax payments; continuing mortgage, insurance, utility, and tax payments; and attorney fees and costs. Kruger submitted a spreadsheet outlining these amounts. Moi cannot deny that he failed to make his payments on the property since before October 2005. Moi cannot deny that he has failed to make his continuing payments on the property. Moi cannot deny that these failures forced Kruger into litigation. Moi's continuing unreasonable conduct has forced Kruger to incur significant attorney fees and costs. Kruger is entitled to recover his damages resulting from Moi's continuing breach.

Moi erroneously argues that Kruger is not entitled to his attorney fees and costs. However, Moi knows that the underlying contract provides for all reasonable fees and costs in litigation, or separate action, in the event of a breach and ensuing litigation. Equitable principles also support that Kruger should recover his fees and costs. Kruger has been forced into this protracted litigation through no fault of his own, but rather solely as a result of Moi's continuing breach and unreasonable conduct.

Moi also erroneously argues that Kruger is not entitled to recover the principle of the loan, in the amount of \$160,000.00. However, due to Moi's breach, Kruger has become solely responsible for the principle in order to avoid foreclosure. Kruger is the only party making any payments at all on the property. Further, from the bank's perspective, Moi and Kruger are jointly and severally liable for the loan. As a result, Kruger is entitled to seek the total principle amount from Moi.

Nothing in the above outline evidences any misrepresentation, fraud, or misconduct on the part of Kruger or his counsel. The trial court properly denied Moi's motion to set aside default judgments, and his request for CR 11 fees. This Court should likewise deny Moi's appeal.

2. The Default Judgments are Consistent with the Relief Sought in Kruger's Complaint.

Moi wrongly argues that the default judgments are void because they include damages that could not have been conceived at the time the complaint was filed, on October 12, 2009. However, review of the complaint indicates otherwise.

Under the notice pleading standard, the complaint need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided. *Champagne et al. v. Thurston County*, 163 Wn.2d 69, 86, note 16, 178 P.3d 936 (2008).

In this matter, the October 12, 2009, complaint outlines in detail the agreement, and joint venture, between the parties. CP (09) 3-7. The complaint references the contract between the parties. *Id.* It further alleges that Moi breached the contract by failing to make "mortgage, insurance, utility, [and] tax payments on the property," and that Moi's breach was ongoing. *Id.* The complaint alleges that Kruger had incurred "damages in an amount to be proven at trial." *Id.* The complaint requests the following relief: past, current, and ongoing money damages; additional damages pursuant to law or equity; pre-judgment interest; reasonable attorney fees and costs; and any other relief deemed necessary by the trial court. *Id.*

Given the above, Moi cannot reasonably argue that the damages sought by Kruger, and included in the default judgments, were

inconsistent with the complaint. The complaint is clear that Moi would seek all damages allowable under Washington law as a result of Moi's continuing breach. Moi cites no authority to support his argument that Kruger was required to plead a certain sum, and there is no such authority. Further, Moi knew the content of the parties' contract, which included an attorney fee and cost provision. Moi also knew the terms of the loan, and payments that he was obligated to make. The complaint served on Moi put Moi on notice that Kruger was seeking all possible damages as a result of Moi's breach. Moi has no basis to argue that the default judgments are void. The Court should deny Moi's appeal.

3. The Trial Court Properly Denied Moi's Request for Fees under CR 11.

If a party violates CR 11, a trial court may impose appropriate sanctions, including reasonable attorney fees. *See* CR 11; *Just Dirt, Inc. v. Knight Excavating, Inc. et al.*, 138 Wn. App. 409, 417, 157 P.3d 431 (2007). A decision under CR 11 is reviewed for abuse of discretion. *Just Dirt, Inc.*, 138 Wn. App. at 417.

In this matter, the trial court found that there was no evidence that either Kruger or his counsel abused the ex parte process by misrepresentation or fraud. There is simply no validity to Moi's allegations of misrepresentation and/or fraud. Kruger's counsel properly

sought entry of the default judgments in ex parte for all of Kruger's damages resulting from Moi's breach of the parties' contract pursuant to the contract and applicable authority. Kruger submitted a spreadsheet of his fees and costs incurred. Kruger served Moi, and he failed to appear. On this record, there is no basis for a finding that the trial court abused its discretion. Moi's appeal should be denied.

4. The Trial Court Properly Denied Moi's Motion to Enforce Judgment.

A decision in regard to a default judgment is within the sound discretion of the trial court. *See Morin et al.*, 160 Wn.2d at 753; *Graham*, 192 Wn. at 126; *Shepard Ambulance, Inc., et al.*, 95 Wn. App. at 238; *Leen*, 62 Wn. App. at 478. The trial court's decision should not be disturbed on appeal unless it abused its discretion. *Leen*, 62 Wn. App. at 478.

Here, Moi's assignment of error is moot since he assigns no other error to the trial court in the 2006 action. Further, the trial court did not abuse its discretion in denying Moi's motion to enforce when Moi had failed to satisfy his debts to Kruger, which at the time included at a minimum the February 16, 2007, default judgment. Kruger never refused to transfer Parcel B to Moi so that he could sell it. Kruger steadfastly agreed to transfer Parcel B as soon as Moi satisfied his debts. Kruger also

proposed and agreed to facilitate the sale of any property provided that the proceeds would be used to satisfy the default judgments. Moi refused to cooperate and facilitate the satisfaction of a default judgment that he admits is valid. Therefore, his motion to enforce was denied. Likewise, Moi's appeal should be denied.

5. Moi Failed to Brief His Appeal of the Trial Court's Order Granting Kruger's Motion to Correct Amended Default Judgment.

Moi assigned error to the trial court's February 7, 2012, order granting Kruger's motion to correct amended default judgment. However, Moi provided no authority or argument to support this contention. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998), citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Regardless of his briefing, Moi's contention regarding the corrected amended default judgment is meritless.

CR 60(a) allows a trial court to grant relief from judgments for clerical mistakes, but not judicial errors. See CR 60(a); *Presidential Estates Apartment Ass'n. et al. v. Barrett et al.*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). In determining whether an error is "judicial" or "clerical," a reviewing court must inquire whether the judgment, as

amended, embodies the trial court's intention, as expressed in the trial court record. *Barrett et al.*, 129 Wn.2d at 326.

In his January 27, 2012, motion to correct the amended default judgment, Kruger sought only to add a judgment summary to the amended default judgment. *See* CP (09) 1627-30. The judgment summary was previously omitted by inadvertence, and arguably unnecessary. *See Bank of Am., NA v. Owens et al.*, 173 Wn.2d 40, 51, 266 P.3d 211 (2011) (holding that a judgment must be in writing and signed by the judge, but need not be in any particular form). However, Kruger sought to correct the amended default judgment at the trial court clerk's request. Kruger's motion to correct and proposed order was properly granted by the trial court.⁸ The corrected amended default judgment added a judgment summary only, which reflected and/or summarized the content of the amended default judgment. *See* CP (09) 1627-30. There were no substantive changes to the amended default judgment. *Id.* Moi has no basis to appeal the trial court's February 7, 2012, order. The Court should deny Moi's appeal.

6. Moi Failed to Brief His Appeal of the Trial Court's Orders Granting Kruger's Motions for Issuance of Writs.

⁸ Notably, the trial court found that CR 11 sanctions were appropriate given Moi's misrepresentation to the court that it previously had not awarded attorney fees to Kruger.

Moi also assigned error to the trial court's March 22, 2012, orders granting Kruger's motions for orders to clerk for issuance of writs. However, again, Moi provided no authority or argument to support this contention. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland*, 90 Wn. App. at 538, citing *Johnson*, 119 Wn.2d at 171. Moi's contention regarding the orders to the clerk for issuance of the writs is meritless.

In Washington, judgments and their enforcement are governed by statute. *TCAP Corp. et al. v. Gervin et al.*, 163 Wn.2d 645, 650, 185 P.3d 589 (2008). As a question of law, statutory construction is reviewed de novo. *Id.*

In this matter, Kruger properly sought the orders for the clerk to issue writs pursuant to Chapter 6.17 RCW, and specifically RCW 6.17.100. As RCW 6.17.100 requires, Kruger demonstrated the following to the trial court:

- Kruger had valid outstanding judgments against Moi.
- Kruger had exercised "due diligence" in ascertaining that Moi had insufficient non-exempt personal property to satisfy the judgments.

- Moi did not occupy either property as a principal residence, nor did either property qualify as a homestead pursuant to Chapter 6.13 RCW.
- Moi had been absent from the properties for at least six months.
- Kruger had served Moi at his last known address, and Moi's counsel, with copies of the motions for issuance of the writs.

See RCW 6.17.100; *see* CP (06) 1876-78; CP (09) 1216-19.

Kruger also properly requested his attorney fees and costs associated with obtaining the writs. *See* RCW 6.17.110(3)(f).

Moi has not made any procedural objections to Kruger obtaining the writs of execution, nor to the ensuing process resulting in the sheriff's sales. Specifically, Moi did not oppose Kruger's motions to confirm the sheriff's sales, which were granted. Moi has therefore waived all of these objections. Issues raised for the first time on appeal generally will not be reviewed. RAP 2.5(a); *see also* *Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007); *Better Fin. Solutions, Inc. v. Caicos Corp.*, 117 Wn. App. 899, 912-13, 3 P.3d 424 (2003). Even if Moi had raised procedural objections at the trial court, as outlined above, Kruger followed the proper procedure in having the writs issued.

Moreover, Kruger was entitled to the orders for the clerk to issue the writs because he had two valid outstanding judgments against Moi. Moi breached the contract with Kruger, and then forced Kruger into protracted litigation to recover the resulting damages. To date, after the two sheriff's sales, Kruger still has not fully recovered his damages from Moi's breach. Moi has no basis for appeal.

J. Kruger Requests His Reasonable Fees and Costs on Appeal.

RAP 18.1 permits a party to recover reasonable attorney fees or expenses on appellate review if supported by applicable law. *See* RAP 18.1(a). Attorney fees are recoverable on appeal if allowed by statute, rule, contract, or equitable principles, and the request is made pursuant to the applicable rule. *See In re the Guardianship of Wells*, 150 Wn. App. 491, 501, 208 P.3d 1126 (2009). RAP 18.9(a) provides for terms if a party, or counsel, uses the appellate rules to delay, or file a frivolous appeal. *See* RAP 18.9(a); *see also Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999).

The contract provides for an award of reasonable attorney fees. Moi filed this appeal as a continuation of his unreasonable conduct and attempt to prolong the litigation. Moi has no reasonable basis for his appeal. He breached the parties' agreement. The Court should award

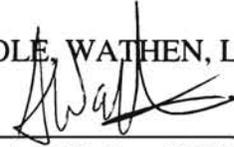
Kruger his fees and costs on appeal pursuant to the parties' contract, equitable principles, and RAP 18.9(a).

V. CONCLUSION

Given the above, this Court should affirm the trial court's orders, and remand solely for the determination of Kruger's remaining attorney fees and costs incurred at the trial court. The Court should also award Kruger his fees and costs on appeal.

DATED this 6th day of September, 2012.

COLE, WATHEN, LEID & HALL, P.C.



Rick J Wathen, WSBA #25539
Attorney for Kruger

APPENDIX

22. **NOTICES:** Whenever provisions are made in this Agreement for the service, giving or delivery of notice, statement or other instrument, such notice shall be deemed sufficient and duly served or delivered if mailed by prepaid United States mail, registered or certified, and addressed to the party at the address shown in this Agreement or at such other address as shall be provided from time to time to the Joint Venture as a change of address of such party. Changes of address shall be provided in like manner.

23. **ATTORNEYS' FEES:** Should any litigation be commenced between the parties hereto or their representatives or should any party institute any proceedings in bankruptcy or similar court which has jurisdiction over any other party hereto or any or all of his or its property or assets concerning any provision of this Agreement or the rights and duties of any person or entity in relation thereto, the party or parties prevailing in such litigation shall be entitled, in addition to such other relief as may be granted to a reasonable sum as and for his or its or their attorneys' fees and court costs in such litigation which shall be determined by the Court in such litigation or in a separate action brought for that purpose.

24. **MODIFICATIONS:** No change or modification of this Agreement shall be valid or binding upon the parties hereto, nor shall any waiver of any term or condition thereof be deemed a waiver of such term or condition in the future, unless such change or modification or waiver shall be in writing signed by all the parties hereto.

25. **VALIDITY:** In the event that any provision of this Agreement shall be held to be invalid or unenforceable, the same shall have no effect in any respect whatsoever upon the validity or enforceability of the remainder of this Agreement.

26. **SURVIVAL OF RIGHTS:** Except as provided herein to the contrary, this Agreement shall be binding upon and inure to this benefit of the parties signatory hereto, their respective heirs, executors, legal representatives and permitted successors and assigns.

27. **GOVERNING LAW:** This Agreement has been entered into in the State of Washington and all questions with respect to this Agreement and the rights and liabilities of the parties hereto shall be governed by the internal laws of that state.

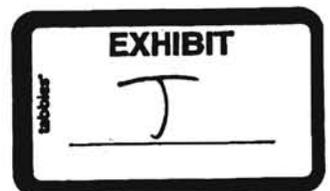
28. **WAIVER:** No consent or waiver, express or implied, by a party to this Agreement to or any breach of default by any other party to this Agreement in the performance by such party of its or his obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other party of the same or any other obligations of such other party hereunder. Failure on the party of a party to complain of any act or failure to act of any of the parties or to declare the other party in default, irrespective of

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FILED
KING COUNTY, WASHINGTON

Judge Laura Inveen

NOV 28 2011

SUPERIOR COURT CLERK

**SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

DOUG KRUGER, a single man,

Plaintiff,

v.

Michael Moi,

Defendant.

Case No. 09-2-36968-2-SEA

**ORDER DENYING MOTION TO SET ASIDE
ORDERS GRANTING DEFAULT
JUDGMENT**

THIS MATTER came on for hearing September 26, 2011, pursuant to the motion of the Defendant to set aside default orders of judgment obtained against him by Plaintiff on February 23, 2010 and May 3, 2010. Also heard were motions on a related matter, 06-2-32029-8 SEA. Having reviewed the motion, the declarations of Andy Garcia, Kerri Schloredt, Michael Moi, Elena Garella, Marc Stern, Mary Louis and Michael Malnati, as well as the Memorandum in Opposition to Motion to Set Aside Default Judgments of the Plaintiff (Sub 64) the documents incorporated therein, and Defendant's Reply (Sub 67), and the Declarations of Michael Moi and Elena Garella in support of Reply (Sub Nos. 65, 66), the pleadings and declarations on file, and having considered the oral argument of counsel, the Court finds as follows:

Michael Moi was validly served

A facially correct return of service is on file in this matter. *Sub 4*. It is presumed valid, and the burden is on the person challenging service to show by clear and convincing evidence that service was improper. Mr. Moi has not satisfied that burden. The Declaration of Service

ORDER DENYING MOTION TO SET ASIDE DEFAULT - 1

ORIGINAL

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indicates the summons and complaint was delivered on October 18, 2009 to an individual at 3843 26th Ave. W (conceded to be Moi's residence) "*JOHN DOE, CO-RESIDENT, WHO REFUSED TO GIVE NAME A Middle Eastern male approx. 35-40 years of age 5'8"-5'10" weighing 160-180 lbs with black hair.*" It is un rebutted that Moi was the only male "co-resident" of the residence at the time. There is no indication any male visitor was at the residence. Moi attended oral argument of this matter. The Court was asked by Counsel for Moi to observe him in court. Although described by his own counsel as of Norwegian and English descent, the Court does not find it surprising that someone might mistake Moi for being of Middle Eastern descent, nor of the age and physical description asserted, and cannot find by clear and convincing evidence that the individual described in the declaration of service was *not* Moi. In making that determination, the court has not considered the "service notes" offered by Kruger and filed in exhibit L to Exhibit B of his Opposition. These notes are not under oath, are hearsay without authentication as a business record, and may not be considered: See Order Granting Motion to Strike entered this date. Moi denies having been the man served on October 18, 2009, and asserts that since a prior default "fiasco" in 06-2-32029-8, he has been on "high alert" for any service of process whatever. Moi dec. 8/11/11. That declaration is self-serving, and the court does not find the assertion credible.

Motion to vacate is untimely

Moi argues the February 23, 2010 Order Granting Plaintiff's Motion for Default Judgment and the May 3, 2010 Order Granting Plaintiff's Motion for Amended Default Judgment were not judgments, and thus the procedure to vacate the orders is governed by CR 55(c), rather than CR60(b). Moi is incorrect. Although they did not contain judgment summaries, and may not have been entered in the execution docket, they were intended to be a final determination of the rights of the parties in the action and are valid judgments. See *Bank of America v Owens*, No. 84044-0 Washington Supreme Court, October 27, 2011. In determining whether the motion to vacate was timely, the following chronology is relevant:

ORDER DENYING MOTION TO SET ASIDE DEFAULT - 2

- a. 2/23/10 – initial judgment entered
- b. Between 2/23/10 and 4/16/10 Moi became aware of initial judgment
- c. 5/3/10 – amended judgment entered
- d. Between 5/3/10 and 5/20/10 Moi became aware of amended judgment
- e. 5/2/11 – motion to vacate judgment filed (later voluntarily stricken)
- f. 8/17/11 - motion to vacate re-noted

Pleadings filed by Moi show he became aware of the first default judgment as early as April 16, 2010, and that he was aware of the amended default judgment shortly after its entry on May 3, 2010. The court finds Moi did not act with due diligence in moving to set aside the default judgments. Moi strategically chose to pursue relief in the bankruptcy court in an attempt to discharge the debt. It is unlikely a coincidence that the first motion to vacate (which was voluntarily stricken) was filed one day less than one year to the day after the amended default judgment was entered, as an unsuccessful attempt to note the motion before the expiration of a year, mindful of that deadline in CR 60.

No appearance was entered by attorney Michael Malnati prior to 5/3/10

Moi argues attorney Malnati appeared on his behalf in April, 2010, and as such was entitled to notice of the intent to present the amended judgment entered May 3, 2010. This position is unsupported. No notice of appearance was ever filed by Moi, or anyone on his behalf, including Malnati. The evidence before the court, including the 4/16/10 e-mail from Malnati to Kruger's attorney Wathen suggests Malnati was corresponding on behalf of one of his "lender clients", who was seeking to lend money to Moi. Absent is any declaration from Malnati indicating he represented Moi Before May 3. Rather, only in a Reply declaration does Moi provide any formal connection between him and Malnati – an invoice for legal work performed *after* May 3, 2010.

Vacating the Default would be prejudicial.

Substantial effort and expense has been incurred as a result of the litigation initiated by Moi against Kruger in the bankruptcy court. Kruger was required to expend substantial costs to successfully defend himself in that litigation, all while making the required payments on the underlying property which is the subject of the business agreement between the parties. Moi concedes that with the exception of a few payments in recent months, Kruger has made all of the loan and tax payments on the property in question. It would be unfair for Kruger to have to start anew in state court.

Motion for sanctions – CR11

There is no evidence before the court that either Kruger or his counsel abused the *ex parte* process by presenting misleading documents, nor that they committed a fraud upon the court. Defendant's motion for CR11 sanctions is DENIED.

ORDER

Defendant's Motion to Set Aside Default Judgment is DENIED.

DATED this 23 day of November, 2011.



Judge Laura Inveen

No. 68008-1
(Consolidated with No. 68009-9)

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

DOUG KRUGER, a single man,

Plaintiff/Respondent,

v.

MICHAEL MOI,

individually as Personal Representative of the Estate of Sherry Moi,

Defendants/Appellants.

**PROOF OF SERVICE OF
KRUGER'S RESPONDENT'S BRIEF**

COLE, WATHEN, LEID & HALL, P.C.
Rick J Wathen, WSBA #25539
Attorney for Plaintiff/Respondent

1000 Second Avenue, Suite 1300
Seattle, WA 98104-1972
Telephone: (206) 622-0494

~~COURT OF APPEALS
STATE OF WASHINGTON
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I, Autumnne L. Weingart, certify under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

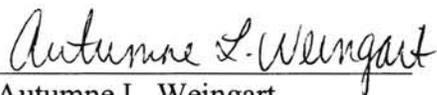
1. I am over the age of eighteen years and not a party to this matter.

2. I certify that on September 6, 2012, I sent via legal messenger for filing the original of Kruger's Respondent's Brief, and for service copies of said document to the following as indicated:

William John Crittenden
300 East Pine Street
Seattle, WA 98122
wjcrittenden@comcast.net

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

DATED this 6th day of September, 2012, at Seattle, WA.


Autumne L. Weingart