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No. 75130-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BELLEVUE PARK HOMEOWNERS ASSOCIATION

Appellant

v.

AKRAM HOSSEINZADEH

Respondent

BELLEVUE PARK HOMEOWNERS ASSOCIATION'S
OPENING BRIEF

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I. INTRODUCTION

This is a case about a condominium unit owner refusing to pay for her share of special assessments for the condominium's common expenses. The undisputed facts are that Appellant Bellevue Park Homeowners Association (the "Association") provided a myriad of notices to Respondent Akram Hosseinzadeh ("Akram") regarding her delinquent assessment account prior to filing a lawsuit. Akram either ignored the notices or responded to them in a threatening manner. Despite the fact that she acknowledged that she had a duty to pay the assessments, she did not pay. Every other owner in the condominium paid his or her share of the special assessments, leaving Akram as the only owner to not have paid.

Akram's continued refusal to pay left the Association with no choice but to file the lawsuit, especially in light of the fact that the statute of limitations was approaching. Akram retained an attorney and contested the lawsuit. The Association prevailed on summary judgment, and the trial court entered a personal judgment against Akram and a foreclosure decree against her unit.

Nearly four months after summary judgment was entered, having no defense for her failure to pay assessments, Akram filed a motion to vacate the judgment based on the unsupported allegation that the lawsuit

was filed due to ethnic or religious discrimination. More specifically, Akram argued that the Association's allegedly discriminatory motive to file the lawsuit was an unconstitutional use of the Washington Condominium Act and the court system. She claimed that entry of the judgment constituted state action and denied her equal protection under the Fourteenth Amendment of the United States Constitution. Despite the fact that no evidence was submitted supporting a finding of discriminatory intent by the Association, the trial court vacated the summary judgment under CR 60(b)(11) on the ground that a trier of fact could potentially find that the lawsuit for unpaid assessments was motivated by ethnic or religious discrimination.

CR 60(b)(11) is confined to "extraordinary circumstances" that are extraneous to the court's action and outside the parties' control or something highly irregular with the court's proceedings. It was not appropriately used in this case. There was nothing irregular about the trial court proceedings. Likewise, there was no occurrence extraneous to the lawsuit that had any impact on the lawsuit that would justify vacating the summary judgment under CR 60(b)(11).

Instead, Akram merely sought a second bite at the apple to challenge the Association's original summary judgment motion based on new legal arguments and newly-submitted evidence – evidence that had

been available to her from the beginning of the lawsuit. However, a CR 60(b) motion to vacate is not a do-over or re-litigation to correct errors of law. Such a practice would erode the public policy of promoting the finality of judgments. But that is exactly what occurred in this case.

Furthermore, no reasonable person could conclude the lawsuit was filed with discriminatory intent based on the record before the trial court. Akram's mere allegations are not sufficient to contest a summary judgment motion, let alone to vacate a summary judgment. The record demonstrates that the Association did not treat Akram any differently by attempting to collect from her. Significantly, the Association filed two other lawsuits against owners who did not pay that resulted in judgments that were ultimately satisfied. Discrimination had nothing to do with the Association filing the lawsuit. Rather, Akram's continued refusal to pay her share of the special assessments was the reason, and the only reason, the Association filed suit.

The trial court not only improperly relied on CR 60(b)(11), it ignored indisputable state law that condominium units owners are liable for assessments. That is the case regardless of whether an owner is unhappy with the governance of the association or whether an owner thinks she may have a separate claim against the association. That is how condominiums pay their common expenses and maintain property values.

If owners could withhold assessment payments in protest, condominium associations would not be able to carry out their function, and the entire condominium form of ownership would be in jeopardy. The Association respectfully requests that the trial court's order to vacate the summary judgment be reversed.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The trial court erred in granting Akram's motion to vacate the summary judgment order.

B. Issues Pertaining to Assignment of Error

1. The Association filed its lawsuit to collect unpaid assessments. Represented by counsel, Akram contested the lawsuit and lost on summary judgment. In her motion to vacate, she made no allegations of irregular proceedings or unusual, extraneous circumstances that impacted the lawsuit. Akram's motion to vacate is based on a constitutional challenge, argues the merits of the case, and includes additional evidence that was available to her from the beginning of the lawsuit. Under these circumstances, should the summary judgment have been vacated under CR 60(b)(11)?
2. Condominium unit owners are liable for assessments to pay for their share of an association's common expenses. The Association levied special assessments against all owners in 2012 and 2014 to pay for repairs and improvements to the common area. Akram admitted she had a duty to pay assessments but did not pay. Should the summary judgment for unpaid assessments have been vacated?
3. The Association filed lawsuits against other owners who did not pay their shares of the special assessments. All

owners except Akram paid. Instead of Akram citing specific facts of the Association or its board of directors discriminating against her, she relied on unsupported allegations and argumentative speculation. Did the Association file the lawsuit with discriminatory motive?

III. STATEMENT OF THE CASE

A. The Special Assessments to Fund Maintenance, Repair, and Improvements to the Common Area.

The Association is a condominium association comprised of 79 units located in Bellevue, Washington, and was created on March 22, 1979. CP 1-2; 139-40. It is governed by the Horizontal Property Regimes Act (RCW 64.32) and applicable portions of the newer Washington Condominium Act (RCW 64.34). Additionally, it is governed by the covenants contained in the Condominium Declaration for Bellevue Park recorded under King County Recorder's File Number 7903220813, and any amendments thereto (the "Declaration"). CP 22.

Around 1999 or 2000, Akram's brother, Abolfazl Hosseinzadeh ("Ab"), purchased unit number 39 in Bellevue Park. CP 308. In about 2002, Ab conveyed the unit to Akram. Id. Thirteen years later on September 30, 2015 (and five days after summary judgment was entered), Akram conveyed the unit to Flex Corporation, of which Ab is the sole member. CP 311; 364-368. For all intents and purposes, Ab and Akram have acted as co-owners of unit 39 with respect to this litigation.

1. The 2012 Special Assessment

In 2012, the Association was engaged in a remediation project to fix its storm water drainage system. CP 133, 370. The planning, bid collection, and final approval of the work was years in the making; in fact, Ab himself voted to allow the Association to complete a “Site Survey and Engineering Analysis” of the Association’s storm water drainage system in November of 2009. CP 370, 380. Three years later, in order to pay for the final phase of the project, the Board of Directors adopted a special assessment in the total amount of \$19,850.20. CP 133. The special assessment was approved in the same manner as all assessments at the Association and was allocated to each unit according to the unit’s undivided interest in the common area. CP 134-45. Akram’s share of the special assessment was \$333.48. Id.

Notice of the special assessment was sent to owners on September 24, 2012, notifying them that each unit’s share of the special assessment was due and payable on November 1, 2012. CP 134-35. The Association sent Akram additional notices on November 19, 2012, December 19, 2012, and January 13, 2013. CP 142, 144, 146. Rather than pay her share, Akram (or Ab – the letter is signed by “A. Hosseinzadeh”) finally responded with a four-page letter dated February 1, 2013. CP 355-59. The

letter was typed in eight-point-font and contained a list of 127 questions addressed to the Association, including for example:

10. Are you morally, ethically, and mentally fit to do what you are doing? Please explain.

...

11. Are you (an) honest person(s)? Please explain. Please also provide your definition of honesty.

...

18. Have you been treated or given medication for any mental or emotional issue, disorder, or diseases, or are you planning to do so? Please explain.

...

19. Have you been admitted to any mental hospital or clinic, or are you scheduled to do so? Please explain.

...

54. Are you hiding your identities for any reason? Why? Please explain.

Id. Akram did not pay throughout 2013, and the Association sent her a fourth delinquency notice on December 18, 2013. CP 148. Akram still had not paid by the time the Association filed its lawsuit on February 20, 2015. CP 1-4, 126. At the time Akram filed her motion to vacate, all 78 of the other unit owners had paid their respective shares of the special assessment. CP 354. Akram was the only owner who had not paid. Id.

2. The 2014 Special Assessment

In January of 2013, the City of Bellevue Fire Department inspected Bellevue Park and determined that the property was in violation of city

code and that a fire alarm notification system needed to be installed. CP 137. The Association signed a contract with a vendor to perform the installation for \$116,000. Id. Since this expenditure was not anticipated or budgeted, the Board of Directors adopted a special assessment in the total amount \$116,070 to be paid by all owners. CP 137-140. Akram's proportionate share of the special assessment was \$1,949.98. CP 139. Owners were given the option of paying their proportionate share in a lump sum or paying in monthly installments for one year from December 1, 2014 to November 1, 2015 (with a 5% service fee added). Id. If owners did not make the lump sum payment, they would be assessed monthly, which was the case for Akram. Id., CP 139, 151-52. Akram's unit was assessed \$170.62 per month for 12 months. Id.

Like the 2012 special assessment, Akram failed to pay her share of the 2014 special assessment. As a result, her account was referred to the Association's attorney for collection. On November 25, 2014, the attorney sent Akram an initial demand letter for unpaid assessments, including the still-unpaid 2012 special assessment. CP 103. The letter stated that the Association reserved its right to foreclose its lien and bring a lawsuit against Akram in the event of nonpayment. Id. Akram (and Ab) did not respond. CP 89. Despite the lack of a response, the Association's attorney sent Akram a second letter dated January 6, 2015, advising her of the

delinquent balance and that the Association would proceed with a lawsuit if the balance was not paid by January 27, 2015. CP 105. The attorney received a response dated January 9, 2015, from “A. Hosseinzadeh” which threatened legal action under the Fair Debt Collection Practices Act, under the Fair Credit Reporting Act, and for defamation. CP 109-110. The letter also requested vast amounts of information, including Association records dating back to 1999. Id.

The Association’s attorney responded on January 26, 2015, by providing an itemized account of the amounts owed, providing copies of the 2012 and 2014 special assessment documentation, and explaining the legal basis for the demand for payment. CP 112-114. In addition, the letter informed Akram that if she wanted additional information, she could contact the attorney to schedule a time to review the Association’s records. Id. Akram (and Ab) did not respond to this letter and no further communication was received from them until after the Association filed the lawsuit. CP 85.

3. The Present Lawsuit

The Association filed suit on February 20, 2015. CP 1-4. Akram retained an attorney, Sean Malcolm, and he filed a Notice of Appearance and Answer on March 27, 2015. CP 7-15. The Answer included 11 affirmative defenses. CP 12-13. The Association filed a motion for

summary judgment on August 25, 2015. CP 18-20. Akram filed her response on September 14, 2015, contesting the Association's claims.

The day before the summary judgment hearing, without any notice to the Association's attorneys, two individuals went to MacPherson's Property Management, the managing agent of the Association, and attempted to make a payment for the 2012 special assessment and 2014 special assessments and have the receptionist sign a statement that Akram's account was paid in full. CP 384-86. The payment only included the base amount of the special assessments; it did not include interest, late fees, attorney fees, costs, or the security deposit. *Id.* In the receptionist's opinion, the two individuals were "forceful and abrasive" and refused to leave until she accepted the payment and signed the statement. *Id.* She did not do so. *Id.*

The next day, the Association prevailed on summary judgment and was awarded all the amounts it requested. CP 200-03. The trial court entered a personal judgment against Akram and a foreclosure decree against the unit. *Id.* Akram filed a notice of appeal on October 23, 2015.¹ CP 211-17. Akram's second attorney, Melissa Huelsman, appeared on December 3, 2015. CP 235-37.

¹ Akram's appeal was filed under case number 74138-1-I. On July 12, 2016, Commissioner Mary Neel of this Court stayed Akram's appeal pending the results of this

Akram's third attorney, David Adler, filed a motion to vacate the summary judgment under CR 60(b)(4), CR 60(b)(5), and CR 60(b)(11) on January 21, 2016. CP 297. The motion was filed nearly four months after the summary judgment was entered. The motion's gravamen was that the Association's reliance on the Washington Condominium Act and use of the court system constituted state action that "effect[ed] an unlawful discrimination" and violated the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution. CP 297, 299, 301-02, 305. In effect, Akram claimed that the Association used the Washington Condominium Act and the court's authority to "evict" her from the property because she was Iranian and not because she owed assessments. CP 298.

Twelve days after filing the motion to vacate, Akram deposed William Bailey, a resident of Bellevue Park since 1997. CP 401, 404. Akram submitted a transcript of the deposition – unsigned – to the court on March 8, 2016. CP 401-45. This was two days before the hearing on the motion to vacate. Mr. Bailey apparently did not sign the deposition transcript until the day before the hearing. RP 6. Akram's reply brief relied heavily on the testimony of Mr. Bailey, citing it seven times. CP 453-458. A copy of the signed deposition was given to the trial judge on the day of the hearing on Akram's motion to vacate. RP 6.

After hearing oral argument on March 10, 2016, the trial court decided it would vacate the summary judgment, stating:

Well, I guess I will grant the order setting aside the-the judgment. It's a very close question because the-the connection here is really very tenuous between the-the national origin discrimination and the-the payments. But I think that a finder of fact could draw the inference that the actions of the condominium association were motivated by discrimination.

RP 31. The order to vacate the summary judgment was entered on March 14, 2016. In the order to vacate, the court determined:

[T]he motion should be granted under Civil Rule 60(b)(11) as sufficient evidence has been presented by Defendant to convince the Court that a reasonable jury could conclude that the use of litigation and the Washington Courts to obtain a judgment and a Court Order to pay a disputed claim for unpaid homeowners special assessment dues was motivated in whole or in part by national origin (Iran) or religious discrimination (Muslim) against the Defendant and her family, in violation of the U.S. Constitution, Amend. XIV and is therefore a sufficient "other reason" to warrant relief from the judgment.

CP 464. The Association filed a notice of appeal on April 12, 2016. CP 482-485.

4. Collection of Assessments Against Other Owners

In addition to the lawsuit filed against Akram, the Association filed two other lawsuits to collect unpaid assessments, including the special assessments at issue in this case. CP 89, 101, 370-71. The cases were filed under King County cause number 14-2-33521-1 and 15-2-

03037-0. CP 101. The Association obtained a judgment in each case, which included a security deposit. CP 89, 370-71. Each case was subsequently resolved by payment from each of the defendants. CP 89. At the time the order to vacate was entered, 78 out of 79 owners had paid the 2012 special assessment; Akram was the only owner who had not paid her share. And all but two of the 79 owners paid the 2014 special assessment, one being Akram. CP 354. However, the other owner had paid all of the 2014 special assessment except just \$175.02. Id.

B. Alleged Discrimination.

1. The 2002 Fair Housing Complaint.

Sometime around 2000, Ab obtained permission from the board of directors to install a satellite dish in the Association's common area. CP 321. The purpose of the satellite dish was to enable his parents to watch television shows broadcast from Iran in Farsi. Id. Some owners were allegedly unhappy with the installation of the dish in the common area. CP 322, 405. Allegedly, this is about when, one owner, Rosemary Ovardia, commented to Akram that Ab's parents should learn English or go back to Iran. CP 321, 423. Ms. Ovardia was not on the board of directors at this time. RP 35; CP 369. Nevertheless, Mr. Bailey stated that he felt that the opposition to the satellite dish was not racially motivated:

I didn't, at the time, feel that [the owners objecting to the satellite dish] animosity was being generated by an objection to having an Iranian or a Persian person having a satellite dish. I felt that the vast majority of it was an objection to having a satellite dish, period...I don't know what was in the minds and the hearts of the people who were doing this.

CP 407.

In any case, Ab and his parents filed a complaint with the Washington State Human Rights Commission (the "HRC") in 2002 over the satellite dish and Ms. Ovadia's alleged statement. CP 322. The parties reached a Pre-Finding Settlement Agreement dated March 22, 2002. CP 18. The agreement provided that the satellite dish could remain in the common area until the Hosseinzadehs either removed the dish voluntarily or they vacated unit 39. CP 315. The agreement did not constitute an admission of wrongdoing or a determination by the HRC that any discrimination had occurred. CP 314.

2. The 2012 Fair Housing Complaint.

Over 10 years later, Ab filed a second complaint with the HRC. CP 308, 372-79. Ab complained that he was discriminated against because the Association allegedly did the following: (1) removed the satellite dish in retaliation for the 2002 complaint, (2) investigated and monitored his family, (3) demanded a mailing address other than his condominium, (4) removed plants from his patio, (5) moved furniture on his patio without

his permission, (6) told other residents his assigned parking was available for other residents to park in, (7) caused his cat to disappear, (8) accused his family of being racist, and (9) charged him a fee that was not charged to others. CP 373.

Following an exhaustive investigation, the HRC concluded that none of Ab's claims had any merit. 377. With respect to the satellite dish, the HRC found that it was removed because its cable lines were run through the gutter and downspout that caused a build-up of debris. *Id.* This build-up caused flooding in the courtyard. *Id.* The HRC also found that the Association's property manager, who was unaware of the 2002 settlement agreement, removed the satellite dish and cables because of the flooding unbeknownst to the board of directors. *Id.* The HRC also found that the Association immediately reinstalled the satellite dish when contacted by Ab and offered to pay for its reconnection if Ab would inform them who his service provider was. CP 376. Ab never provided this information. *Id.* Based on the foregoing findings, the HRC concluded:

The evidence indicates that [the Association's] actions in maintaining its property are imposed on all residents, not just [Ab]. The investigation was unable to establish a causal connection between [Ab's] opposition to an unfair practice under RCW 49.60 and [the Association's] actions. Therefore, the facts do not support the elements of proof required to show that [the Association] engaged in an unfair practice in violation of RCW 49.60.

CP 377.

Other than the 2002 and 2012 complaints filed with the HRC, the Association had not received any other complaints from Ab, Akram, or their parents regarding alleged discrimination until Akram filed her response to the Association's summary judgment motion in this case. CP 370.

IV. ARGUMENT

A. CR 60(b)(11) Is Not Applicable.

CR 60(b)(11) permits vacation of a judgment for “[a]ny other reason justifying relief from the operation of the judgment.” The use of CR 60(b)(11) is “confined to situations involving extraordinary circumstances not covered by any other section of the rule.” *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (quoting *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). “Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court’s proceedings.” *Id.* It is intended for “extreme, unexpected situations.” *In re Pet. of Ward*, 125 Wn. App. 374, 379 104 P.3d 751 (2005). “Cases decided under CR 60(b)(11) show that ‘extraordinary circumstances’ are unusual circumstances that are not within the control of the party.” *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2010).

The standard of review for a decision for granting a motion under CR 60(b) is abuse of discretion. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999). A court abuses its discretion when its decision is based on untenable grounds or reasoning. *Id.*

1. There Are No Extraordinary Circumstances Related To Irregularities Extraneous To the Court to Justify Vacating the Summary Judgment.

Akram did not even allege that were any irregularities extraneous to the trial court's proceedings that would warrant vacating the judgment. Instead, she merely encouraged the trial court that "[i]f there is any evidence of national origin based prejudice then the interests of fairness obligate this Honorable Court to vacate its Order on Summary Judgment...." CP 305. However, Akram does not cite any supporting authority for the proposition that perceived "fairness" is an extraordinary circumstance extraneous to the court's action to vacate a judgment under CR 60(b)(11). Indeed, a party alleging that an order is unfair has been rejected as a basis to vacate under CR 60(b)(11). *Yearout*, 41 Wn. App. at 902 (finding that a separation agreement's alleged unfairness did not constitute extraordinary circumstances justifying relief under CR 60(b)(11)).

Instead, and as noted above, courts have only utilized CR 60(b)(11) when irregularities exist that are extraneous to the court's action

and are out of the parties' control. For example, this Court found extraordinary circumstances to relieve plaintiff from a judgment when plaintiff's attorney suffered from severe depression and failed to comply with a discovery order through no fault of the plaintiff. *Barr v. MacGugan*, 119 Wn. App. 43, 47, 78 P.3d 660 (2003). This Court found that plaintiff diligently provided the necessary information to her attorney and that the irregularities were outside the control of plaintiff and the court. *Id.* at 48.

Likewise, a change in the law has been deemed extraordinary circumstances in certain cases. *Estate of Treadwell v. Wright*, 115 Wn. App. 238, 249-50, 61 P.3d 1214 (2003). In fact, the single case cited by Akram in support of vacating the judgment under CR 60(b)(11) involved a change in the law. CP 305. In that case, the trial court held that guarantors could not be held liable for a deficiency judgment under the Deed of Trust Act. *Union Bank, N.A., v. Vanderhoek Assocs., LLC*, 191 Wn.App. 836, 365 P.3d 223 (2015). The trial court relied on a Division Two opinion for its decision. *Id.* at 840. Eighteen days later, this Court issued its opinion in *Wash. Fed. v. Gentry*, 179 Wn. App. 470, 319 P.3d 923 (2014), which disagreed with Division Two's opinion. *Id.* at 841. The trial court subsequently vacated its judgment on the basis that there was a change in the law. *Id.* at 842. On appeal, Division Two held that the trial court's

order to vacate was tenable based on the change in law that resulted in the divisional split. *Id.* at 848.

In contrast, there is no change of law involved in this case or any other irregularities extraneous to the court's action that would merit vacating the judgment. There was no "extreme, unexpected situation" outside the control of the parties that impacted the trial court proceedings. This case involved two parties represented by counsel from the outset. Akram contested the Association's summary judgment motion. She lost. There is no basis under CR 60(b)(11) for the court to vacate the judgment, and indeed, she cited to none.

2. Akram's Constitutional Challenge To the Summary Judgment Asserts An Error Of Law That Can Only Be Addressed On Appeal.

It has long been established that CR 60(b) motions are not a substitute for an appeal:

The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. ***It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen.*** That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari according to the case, but it is no ground for setting aside a judgment on motion.

Kern v. Kern, 28 Wn.2d 617, 619, 183 P.2d 811 (1947) (quoting 1 Henry Campbell Black, *A Treatise on the Law of Judgments*, § 329 at 506 (2d ed.) (emphasis added)).

In her motion to vacate, Akram raised the legal argument that the Washington Condominium Act and the summary judgment order was tantamount to unconstitutional state action because it violated the Equal Protection Clause of the Fourteenth Amendment. CP 299. This argument points to an error of law – the court’s order was unconstitutional. Constitutional challenges are issues of law that are reviewed de novo. *Washam v. Sonntag*, 74 Wn. App. 540, 507, 874 P.2d 188 (1994). As a result, the constitutional challenge was not appropriately brought in the CR 60(b) motion. That said, Akram has preserved her right to appeal under the stayed case number 74138-1-I and can address alleged errors of law in that appeal.

Of equal importance, Akram’s new legal argument could have been made in response to the Association’s motion for summary judgment, but she did not make it. Instead, four months after the summary judgment was entered, she attempted to use CR 60(b)(11) as a vehicle to get a second bite of the apple to contest the Association’s summary judgment motion. Consequently, the trial judge reviewed the summary judgment order and simply changed its mind that there was an issue of

fact. This is not the purpose of CR 60(b) and would severely undermine the public policy promoting the finality of judgments. *See e.g., Genie Indus., Inc. v. Mkt. Transp. Ltd.*, 138 Wn. App. 694, 715, 158 P.3d 1217 (2007) (stating “[i]t must be remembered that one of the most important services the courts provide is to bring legal disputes to an end.”). As a result, Akram must pursue any alleged errors of law through her pending appeal.

3. Akram Is Not Entitled To a “Do-Over” By Submitting New Evidence That Was Available To Her From the Beginning.

Akram’s motion to vacate is based on additional evidence that she collected after the case was over. Based on this evidence, she asked the trial court to review its own summary judgment – in effect, she requested (and received) a “do-over” so she could litigate the case differently.

However, introduction of new evidence only justifies vacating a judgment in a limited circumstance: where the new evidence could not have been discovered with due diligence in time to move for a new trial. CR 60(b)(3). Akram’s evidence consisted of her own declaration (CP 307-18), Ab’s declaration (CP 319-26), Mr. Adler’s declaration (CP 327-30), and William Bailey’s deposition testimony (CP 401-45), which was taken over four months after the summary judgment order was entered.²

² Significant portions of these declarations, including the entirety of Mr. Adler’s declaration, were stricken as inadmissible hearsay.

Ab and Akram's declarations only contain information that was available to them from the start of the lawsuit. There is no evidence that could only have been discovered after the summary judgment hearing. As for Mr. Bailey's deposition, he has been a resident at Bellevue Park since 1997 and has known Ab since Ab purchased unit 39. CP 404. He could have been deposed or submitted a declaration during the seven months between when the case was filed and when the summary judgment hearing occurred. Moreover, the declarations and deposition only provided evidence of alleged occurrences from about 2001 to 2014, all of which could have been discovered and introduced before the summary judgment hearing. As a result, Akram's motion violated CR 60(b)(3), which makes it clear that CR 60 motions are not intended to allow a party to introduce additional evidence in an effort to re-litigate the merits of the case.

4. Akram's Motion to Vacate Was Based on Speculation and Allegations That Have No Evidentiary Support.

Mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish a genuine issue of fact. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*,

106 Wn. 2d 1, 13, 721 P.2d 1 (1986). The non-moving party must set for specific facts rebutting the moving party's contentions. *Id.*

The declarations and deposition supporting Akram's motion to vacate contain a series of unsupported allegations and argumentative speculation that allegedly showed the Association filed the lawsuit with discriminatory motive. For instance, Akram and Ab claimed that the board of directors "refused...to answer our questions about why the special assessment was being imposed." CP 310-11, 324. Ab and Akram also claimed that they "tried to resolve the assessment problem" but the board refused to meet with them. *Id.*

Tellingly, neither Akram nor Ab provided any evidence to support these mere allegations. They provided no emails, letters, or any other documentation or testimony to demonstrate they attempted to meet or work with the board or resolve the assessment problem. Indeed, these mere allegations of a desire to meet with the board and pay the special assessments are completely inconsistent with the hostile and threatening letters they sent to the Association and its attorneys in 2013 and 2015. CP 109-10, 355-59. Furthermore, they provided no evidence to support the allegation that the board refused to meet with them. In fact, the board of directors had no record of ever receiving any request from Akram or Ab to meet and discuss the delinquent assessments. CP 371.

Most of Akram's motion focused on the alleged behavior of Ms. Ovadia. Akram relied on Ms. Ovadia's alleged statement that Akram's parents should go back to Iran in 2002. CP 309. However, that statement pre-dated the decision to file this lawsuit by 13 years and is not germane to the current issue of whether Arkam paid her assessments. Akram also stated that she believed that Ms. Ovadia was on the board of directors and had used the unpaid special assessments as a reason to force Akram to sell her condominium. CP 310. However, Ms. Ovadia left the board in 2013. CP 369. She had no involvement in the decision to proceed with the lawsuit against Akram, which was filed in 2015.

In addition, Ab claimed that the Association "immediately referred the matter to its attorneys." CP 324. However, the record also belies this unsupported allegation. The Association sent numerous delinquency notices to Akram over the course of more than two years. CP 142, 144, 164, 148, 103, 105, 112-114. Each and every notice the Association sent was either ignored or responded to with threats of litigation or bizarre questions in letters signed by "A. Hosseinzadeh." CP 109-10, 355-59.

Finally, Ab and Akram repeatedly make reference to removal of the satellite dish in 2012 in an effort to show that the board of directors discriminated against them by filing the lawsuit. However, removal of the

satellite dish in 2012 was investigated by the HRC, which found that no discrimination occurred.

In sum, the record does not support Akram and Ab's self-serving, unsupported allegations of discrimination. Indeed, it completely contradicts and discredits their contentions. No reasonable person could conclude that the lawsuit to collect unpaid assessments was filed with a discriminatory purpose.

B. The Association's Use of Its Collection Remedies Under State Law and the Declaration Was Not Discriminatory.

1. All Unit Owners Are Liable For Assessments To Pay Their Share Of the Association's Common Expenses.

A condominium association's common expenses are charged to each owner according to his or her unit's percentage of undivided interest in the common areas. RCW 64.32.080. In order to pay for the common expenses, the board of directors has to power to levy assessments against all units. RCW 64.34.304(1)(b); Declaration sections 9.01-02. (See CP 24.) "The board of directors *shall enforce collection of any delinquent assessment...in any...manner permitted by law.*" Declaration section 9.08. (See CP 26.) (emphasis added). The Association has the right to bring a suit against and owner personally and to foreclose its lien against the unit. RCW 64.34.364(9), (12); Declaration sections 9.07, 9.08.4. (See CP 25-27.)

In her motion to vacate, Akram did not dispute that she is liable for the assessments; in fact, she admitted that she has a duty to pay assessments as a unit owner. CP 456. The board of directors has a non-discretionary duty to enforce collection of assessments. When she continually ignored requests to pay or responded with threats of litigation and hostility, Akram left the board with no choice but to exercise its right and duty to bring the lawsuit.

2. Unit Owners May Not Withhold Payment Of Assessments As A Form Of Protest Regardless Of Their Dissatisfaction Or Perceived Claims Against Their Association.

The fact that Akram and Ab are dissatisfied with the board of directors' governance of the Association and/or believe they have claims against the Association does not absolve them from liability for their assessments. Much like a citizen must pay taxes regardless of his or her feelings about the government, condominium owners who are dissatisfied with how a condominium is governed or believe they have claims against their association cannot withhold payment of assessments. *See Panther Lake Homeowners Ass'n v. Juergensen*, 76 Wn. App. 586, 591, 887 P.2d 465 (1995) (holding that “[l]ot owners' remedies are limited to making their wishes known to the Association, casting their votes, and seeking declaratory relief if the Association acts beyond its authority.”); *See also* RESTATEMENT (THIRD) OF PROPERTY, § 6.16 at 289 (2000) (“The remedy

of members dissatisfied with the board's actions is removal or replacement of the board members through the election process.”)

This was not a case where it is alleged that the Association only assessed Akram or assessed her more than her unit's proportionate share. All owners were assessed according to their units' percentage of undivided interest in the common area to pay for legitimate maintenance and repair projects to the condominium. There is no question that Akram owed the debt and received numerous notices and requests to pay but refused to do so. Regardless of whatever claims Akram and Ab felt they had, the trial court had no basis to vacate the summary judgment for unpaid assessments.

3. The Condominium Act and Declaration Are Facially Neutral and Apply to Everyone Equally.

Even assuming Akram could bring a constitutional challenge in a CR 60(b) motion, her argument is misplaced. Akram relied heavily on *Shelley v. Kramer* to argue that the Association's use of the Condominium Act and the summary judgment was unconstitutional. 334 U.S. 1, 68 S. Ct. 836 (1948). However, *Shelley* is completely distinguishable and is irrelevant to Akram's liability for unpaid assessments under the Condominium Act and the Declaration.

Shelley involved the judicial enforcement of a facially discriminatory private restrictive covenant that barred anyone not of the “caucasian race” from owning property in a neighborhood. *Id.* at 4. The Court held that a state court order enforcing the restrictive covenant

constituted state action and was a violation of the Equal Protection Clause. *Id.* at 10.

Unlike *Shelley*, this case involves the application of a facially neutral statute and Declaration that both require all owners, regardless of race or ethnicity, to pay their share of a condominium association's common expenses. The statute and Declaration do not deprive Akram of her ability to acquire, enjoy, own or sell her unit based on her race like the restrictive covenant did in *Shelley*. Rather, the statute and Declaration merely provide a remedy to condominium associations against individuals who do not pay their condominium assessments. Akram would certainly be entitled to continue to enjoy and own the property if she paid her assessments as is required of all owners in this state. However, she did not do so. This Court's order enforcing Akram's obligation to pay assessments like everyone else does not deny defendant equal protection.

C. The Association Did Not Treat Akram Differently Than Any Other Owners.

1. The Lawsuit Was Not Motivated By Discrimination When (1) Akram Refused To Pay, (2) Lawsuits Were Filed Against Other Owners, and (3) Arkam Was the Only Owner Who Did Not Pay.

Akrma's motion to vacate relied heavily on her claim that she was sued for only \$170.00, which she argues showed the Association's discriminatory motive in bringing the lawsuit. *See* CP 70, 300, 302, 303, 456; RP 16. This was an inaccurate representation that was repeatedly made to the trial court. At the time the lawsuit was filed she failed to pay

the 2012 special assessment, three installments of the 2014 special assessment, late fees, a security deposit,³ attorney fees, and interest at 12 percent. In fact, she owed \$2,870.28 (not including attorney fees or costs) by the time the Association filed the lawsuit and the amount was continuing to grow as additional 2014 assessment installments came due. CP 2.

Conspicuously absent in Akram's motion to vacate is any mention of the 2012 special assessment that she failed to pay. And to reiterate, Akram was given seven notices of her delinquent balance before the lawsuit was filed. There was no indication that she had any intention of paying the past due balance or the future 2014 special assessment installments that had not yet come due. Moreover, the three-year statute of limitations to collect the 2012 special assessment would have run later in 2015 had the association not filed the lawsuit. *See* RCW 64.34.364(8).

Akram also did not address the fact that the Association filed two other lawsuits against other owners who failed to pay their share of the special assessments. The Association obtained judgments in each case,⁴ and each of the judgments was subsequently satisfied. As a result, Akram

³ The Association can assess a security deposit of three months of assessments on delinquent accounts pursuant to Declaration section 9.08.2. (CP 26.)

⁴ Each judgment included the three-month security deposit that was also assessed to Akram's account.

was the only owner who did not pay the 2012 special assessment and the 2014 special assessment.

Bottom line, Akram was assessed in the same manner as all other owners to pay for the 2012 storm drainage remediation project and the 2014 fire alarm installation project. There is simply no connection between her claims of discrimination and the lawsuit that was filed.

2. There is no Evidence of Discrimination by the Board of Directors in the Record.

Akram devoted a considerable portion of her motion to vacate detailing the history of a satellite dish that Ab installed in the common area in 2002. However, the events related to the satellite occurred between four and 16 years ago and have nothing to do with the lawsuit to collect Akram's unpaid assessments.

In their declarations, Ab and Akram both described alleged events that led up to the installation of the satellite dish in 2002 and Ab's complaint filed with the HRC at that time. However, the 2002 Pre-Finding Settlement Agreement was reached between the Association and Ab. The HRC never found that discrimination occurred in connection with Ab's 2002 complaint.

Akram and Ab also stated that the Association removed the satellite dish in 2012. What they failed to disclose to the trial court is that

Ab filed the 2012 complaint with the HRC due, in part, to removal of the satellite dish. The HRC thoroughly investigated Ab's complaints and found that no unlawful discrimination occurred. In particular, the HRC found that the Association removed the satellite dish because its wiring was contributing to flooding and promptly had it re-installed when it was contacted by Ab. Furthermore, the HRC found that the Association offered to pay to have it reconnected, to which Ab did not respond.

There was simply no connection between the satellite dish and the Association's lawsuit to collect unpaid assessments, and Akram did not submit a single fact that tied the two together. No reasonable person could conclude that events related to the satellite dish served as the Association's motive to file this lawsuit for unpaid assessments.

D. The Association Requests Its Attorney Fees, Costs, and Expenses on Appeal.

Pursuant to RAP 18.1, the Association respectfully requests is reasonable attorney fees, costs, and expenses related to this appeal pursuant to the Condominium Act, which provides:

The Association shall be entitled to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment. In addition, the association shall be entitled to recover costs and reasonable attorneys' fees if it prevails on appeal and in the enforcement of a judgment.

RCW 64.34.364(14). In addition, the request is based on the Declaration, which provides:

The Board of Directors may commence an action to foreclose a lien for assessments and in any such action shall be entitled to recover reasonable attorneys' fees and all costs and expenses reasonably incurred in the preparation or the prosecution of said action, in addition to taxable costs permitted by law.

Declaration section 9.08.4. Both the statute and Declaration provide a basis to award the Association its fees and costs.

IV. CONCLUSION

All condominium units owners are required to pay assessments in Washington state. Akram is no different. She is responsible for her share of the special assessments that all Bellevue Park unit owners paid to fix the storm water drainage system and install a fire alarm notification system. The record clearly establishes that Akram was contacted repeatedly with notices and requests to pay before the Association filed the lawsuit. The summary judgment was properly entered.

This case has nothing to do with discrimination. Akram submitted mere allegations and argumentative speculation not supported by any specific facts that the lawsuit was filed with a discriminatory purpose. On the contrary, there was clear and overwhelming evidence that the lawsuit was filed with a non-discriminatory purpose. Akram also submitted new,

purported evidence in support of her motion that was available to her the entire time. Finally, there were no unusual circumstances extraneous to the lawsuit. Akram retained an attorney at the outset and lost on summary judgment. Her motion to vacate was a disguised attempt to take a second bite of the apple to respond to the merits of the Association's summary judgment motion. Under these circumstances, the trial court abused its discretion in vacating the summary judgment based on CR 60(b)(11). The Association respectfully requests that the order to vacate be reversed and that it be awarded its attorney fees and costs on appeal.

Dated this 25th day of August, 2016.

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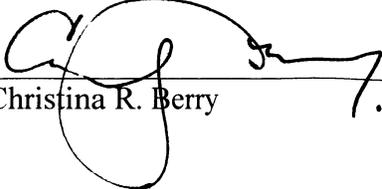
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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 26TH day of August 2016, I caused a true and correct copy of Bellevue Park Homeowners Association's Opening Brief and a copy of the Verbatim Report of Proceedings to be served on the following via the method indicated below:

VIA EMAIL/U.S. MAIL

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