

NO. 43103-3-II

COURT OF APPEALS DIVISION TWO
OF THE STATE OF WASHINGTON

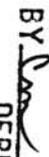
SHARIN R. METCALF and BRYAN BOOREN

Appellants,

vs.

CFA/NW MORTGAGE PROFESSIONALS, CFA FINANCIAL
SERVICES, INC., and BANK OF AMERICA

Respondents,

FILED
COURT OF APPEALS
DIVISION II
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APPEAL FROM SUPERIOR COURT FOR CLALLAM COUNTY
CAUSE NO. 10-2-00675-6

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

The matter on review concerns a trial court's order that: vacated a default judgment under CR 55 and/or CR 60, found that Bank of America is a creditor, and placed certain terms and conditions upon the parties, specifically:

the Bank of America shall cease and desist from non-judicial foreclosure unless and until such is authorized by the Court or this matter is no longer pending provided that Plaintiffs pay the monthly mortgage payment due under the terms of the note commencing with the February 2012 payment.

The appellant requests the order be negated because of certain findings, terms and conditions which do not conform to the standards for vacating a judgment.

II. ASSIGNMENTS OF ERROR

Assignments of Error

- A. The trial court erred when it found Bank of America remained a creditor of Homeowners?
- B. The trial court erred when it conditioned its cease and desist order against the Bank of America on bringing on payments being made as of February 2012?

- C. The trial court erred when it vacated the default judgment with terms and conditions?

Issues Pertaining to Assignments of Error

1. Under a motion to vacate default judgment, does a trial court abuse its discretion making a conclusive finding of fact as to a Bank's creditor status where when the complaint pertained to loan origination issues and the motion pertained to existence of substantial evidence to support prima facie defense for the Bank?
2. Under a motion to vacate default judgment, does a trial court abuse its discretion when conditioning a cease and desist order on payments to the Bank when the complaint pertained to loan origination issues and the motion pertained to existence of substantial evidence to support prima facie defense for the Bank?
3. Whether the conditions in the order below are ambiguous because of the syntax of the order?

III. STATEMENT OF THE CASE

A. Background and Procedural History

On June 24, 2010, Appellants Sharin R. Metcalf and Bryan Booren ("Homeowners") filed a lawsuit for "Breach of Contract, Violation of the Covenant of Good Faith and Fair Dealing, Fraud, Misrepresentation, Unconscionable Behavior; Predatory Lending and Elder Abuse." CP 43,

200, 246-260. On August 3, 2010, Homeowners served their Summons and Complaint on Respondent Bank of America. CP 44, 201, 210, 238-9, 242-43. Bank of America's in-house assistant general counsel, Todd Boock was assigned the matter in October 2010, but took no action to respond. CP 44, 201; *see also*, CP 210 ("but it is believed Mr. Boock mistakenly forgot to assign the Complaint to outside counsel"). The reasons for these failures was unknown or in dispute. *Id.* More than one year elapsed and no notice of appearance, answer, or other response was received, the Homeowners filed a motion for default judgment. CP 44, 165, 201. Such motion was filed on July 19, 2011, and accompanied a declaration of Plaintiff Booren. CP 44, 63, 149-163. The prayer for relief sought judgment against the named defendants; costs and attorney's fees, and other, and further relief. CP 44, 201. On July 20, 2011, a default judgment was entered against Bank of America and CFA/NW Mortgage Professionals. CP 44, 221-222. The default judgment awarded damages of \$537,000.00 to Homeowners. CP 44, 222.

Appellant Metcalf remained in contact with Bank of America regarding their loan; but, it is factually disputed as to whether such communications caused clarity or confusion amongst the parties as to the status of the lawsuit, authority of the parties or whether Bank of America actually knew of the pending litigation at that time and/or willingness to

set aside judgment. CP 50-51, 166, 201, 211; *but see*, CP 61-62, 63-64, 67-70, 186-188. Further, September 22, 2011, is when Bank of America claims to have received their actual notice of the default judgment and sentence. CP 45, 61-62, 201-202, 211. At that point, Bank of America further claims this matter was then referred to its attorneys on September 23, 2011. CP 62, 91, 166, 201-202; *see also*, CP 218-219 (Notice of Appearance).

Thereafter, Bank of America's attorneys filed a motion to vacate the default judgment on November 14, 2011. CP 199-213. Their pleadings indicated that "it appears that Mr. Boock, who is responsible for high volume of cases, mistakenly forgot to sign the complaint to outside counsel." CP 44, 165, 201. Mr. Boock is no longer employed by Bank of America and the Court had no information from him as to why he did not assign the complaint to outside counsel as contemplated. CP 165, *but see*, CP 61-62 (disputed facts). Further, the meaning and scope of the allegations of the complaint were in dispute in the matter below. *Compare*, CP 200, 203-209 (Bank of America's analysis of allegations); *with*, CP 70; *compare also*, CP 223-233 (evidence in support); *and*, CP 234-236 (Motion for Default Judgment); *with also*, CP 246-260 (complaint).

B. Facts Material to Issues on Appeal

On January 19, 2012, the Hon. Ken Williams granted Bank of America's motion to vacate default order and judgment, and added certain terms and conditions:

ORDERED that Defendant Bank of America, N.A.'s Motion to Vacate Default Order and Judgment is granted;

The order of vacation is dependent upon Defendant Bank of America paying the costs and attorney's fees of the Plaintiffs and brining <sic> the initial Motion for Default and in contesting the Motion to Vacate herein. Additionally, the Bank of America shall cease and desist from non-judicial foreclosure unless and until such is authorized by the Court or this matter is no longer pending ***provided that Plaintiffs pay the monthly mortgage payment due under the terms of the note commencing with the February 2012 payment.***

CP 48 (emphasis supplied). As partial basis for these findings, Judge Williams found:

It appears to the Court that the Defendant Bank of America has presented arguably legally viable defenses to Plaintiffs complaint. Some of these include statutes of limitations issues, and others relate more directly to the fact that Bank of America was not directly involved as an entity in any of the procedures leading to this lawsuit.

Additionally, it has been held that Defendants have a due process right to assume that a default will not exceed or substantially differ from the demand stated in the complaint. *See Connor, supra*, at page 173.

Here while the complaint is broad enough to contain the Plaintiffs' request for relief as stated in the default judgment, the specifics of that claim were not directly pled or addressed in the summons and complaint which, on its face, appears to be directed more towards the lending process and less towards damages which accrued from the failure of the lender to disclose certain property title defects. The Court also notes that the default judgment

contemplates that at some point in time the injunction granted would likely be removed. ***Defendants remain a creditor of the Plaintiffs under the terms of the mortgage.*** While the mortgage may at some point be deemed invalid under the Plaintiffs complaint, no permanent injunction was contemplated by the default order of judgment.

It may be noted that the Defendant Bank of America likely does not accept excuses when payments are received late on credit cards or other obligations and imposes a contracted for late fee. The law is not quite so harsh and will allow excused to be argued and if deemed equitable a Court can relieve a party of what might otherwise be harsh use of process to obtain a result which might not otherwise have occurred.

Under all of the circumstances presented to the Court it is appropriate that the default judgment against Bank of America be vacated.

CP 46-47 (emphasis supplied). The Court then determined certain terms and conditions, i.e., “[t]he rule contemplates that there would be terms assessed as a condition of allowing a vacation of a default judgment when it is appropriate to do so.” CP 47. The Notice of Appeal was filed February 17, 2012. CP 7. The Court’s analysis thereafter appears to apply CR 60 and *Connor v. Universal Utilities*, 105 Wn.2d 168, 172-173, 712 P.2d 849 (1986) (which cites therein CR 55(b)(2) and certain provisions of Ch. 4.28 RCW); *see* CR 45-47.

With regards to Bank of America’s alleged rights, claims and interests in and to the mortgage, the complaint does not allege Bank of America, N.A., formerly Countrywide Home Loans being a creditor, owner, holder or beneficiary of the Homeowner’s mortgage (see generally,

CP 246-260) nor does Homeowner's motion for default (CP 221-241)¹; instead Homeowners was alleged the originating lender and broker were CFA/NW and/or CFA/FS; and Bank of America, N.A. and its predecessors in interest were involved and/or co-conspirators to the claims alleged. CP 258 (specifically "secure additional payments and money from Plaintiffs and conceal its nature from Plaintiffs").

In support of their argument for vacating the judgment, Bank of America submitted, exhibits C and D of the Declaration of L. Marquez-Garnett and exhibit A of the declaration of R. Welch. CP 200 ("The underlying agreements); *see* CP 90-93, CP 125-129, 165, 169-174, 203-212. Bank of America also claims to have transferred the servicing of the clients loan from BAC Home Loans Servicing, LP to Saxon Mortgage Services on August 1, 2011. CP 167; *but see*, CP 186 (Green Tree is servicing the mortgage). Further Respondent claimed Appellant Metcalf ceased making her monthly mortgage payments. *See* CP 200.

IV. ARGUMENT

In its order, the Trial Court decided certain matters reserved for a motion for summary judgment or trial on the merits under the semblance of a motion to vacate a default judgment. Such does not satisfy the

¹ As argued by the respondents, "all ten claims are premised on the allegation that Plaintiffs purchased a loan they did not understand and could not afford." CP 200, 203.

standards of vacating an order. Homeowners respectfully request the order be negated and matter remanded with instructions.

Vacation of a judgment is an exercise in equity. *See TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 205, 165 P.3d 1271 (2007). In addition to vacating the order, the rules contemplate just terms and other remedies. CR 55 states, in relevant part:

Generally. For good cause shown and ***upon such terms as the court deems just***, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

CR 55(c)(1). CR 60 states: “Other remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.” CR 60(c); *see also*, Ch. 4.72 RCW. Equity must be applied in a meaningful manner. *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968). Accordingly, a trial court’s grant of equitable relief is reviewed to determine whether the remedy is based upon tenable grounds or tenable reasons. *See State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here the Trial Court found, “[t]he rule contemplates that there would be terms assessed as a condition of allowing a vacation of a default judgment when it is appropriate to do so.” CP 47. Which rule the Trial Court applied is not explicitly stated (arguably, either falls within the

authority of the court in fashioning equitable relief) and whether it meant to make a conclusive finding of fact as to Bank of America's status, is unclear.

A. Standard of Review

In general, matters applying equity, including terms and conditions from motions to vacate judgment, are reviewable for abuse of discretion. *See Willener v. Sweeting*, 107 Wn.2d 388, 397, 730 P.2d 45 (1986); *Caouette v. Martinez*, 71 Wn. App. 69, 856 P.2d 725 (1993) (The court of appeals will review a trial court's decision to vacate a judgment under subdivision (b) for abuse of discretion.); *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999) (The standard of review for grant or denial of a preliminary injunction is abuse of discretion).

Abuse of discretion occurs when the decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court's decision is manifestly unreasonable where: (a) it is outside the range of acceptable choices, given the facts and the applicable legal standard; (b) it is based on untenable grounds if the factual findings are unsupported by the record; or, (c) it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct

standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), *review denied*, 129 Wn.2d 1003, 914 P.2d 66 (1996).

Here the decision was an abuse of discretion, i.e., it was manifestly unreasonable or based on untenable reasons because (1) portions lie outside the range of acceptable choices given the applicable legal standard; and/or, (2) it otherwise fails to serve the intent of the rule and/or equity. Further, the order unfairly prejudices the Homeowners and portions of the order are ambiguous and/or lack clarity.

B. Findings and Order Lies Outside The Range of Acceptable Choices Because The Standard Is Determining Existence of Substantial Evidence Not Conclusiveness of Fact.

The general procedure for determining whether to vacate a default judgment, first involves assesses two factors: (1) the existence of substantial evidence to support at least a prima facie defense to the claim asserted; and, (2) the reason for the party's failure to timely appear based on mistake, inadvertence, surprise or excusable neglect. *See White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968); *Calhoun v. Merritt*, 46 Wn. App. 616, 618, 731 P.2d 1094 (1986); *see also, Seek Sys. v. Lincoln Moving/Global Van Lines*, 63 Wn. App. 266, 818 P.2d 618 (1991) (Although the requirements for setting aside a default order are not the same as those for setting aside a default judgment, two factors to be

considered in each instance are excusable neglect and due diligence overall).

The standard of substantial evidence to support a prima facie defense is not the equivalent to a conclusive factual finding. *Compare, e.g., White*, 73 Wn.2d 351; *with, e.g., CR 56(c)* (summary judgment). The Court is permitted to find the existence of a substantial defense through prima facie evidence, but not the outcome of a fact or defense. *See Id.* A factual finding is appropriate under CR 56(c) motion, where parties may offer arguments, evidence, and rebut the genuineness and materiality of each other's facts. *Id.*² Such did not occur here.

Here the Court found: "Defendants remain a creditor of the Plaintiffs under the terms of the mortgage" and then conclusively found such would give them the right to foreclose. While it is permissible to review the affidavits and exhibits C and D of the Declaration of L. Marquez-Garnett and exhibit A of the declaration of R. Welch (as well as opposing counsels arguments about the veracity of such claims); to find there is "substantial evidence" to "support at least a prima facie defense to

² Therein states:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c).

the claim asserted”; it was not the proper proceeding, under the standard of either rule, for finding such evidence to be true and conclusive. *White*, 73 Wn.2d 351; CR 60; *see also*, CR 56(c). Thus the order should be remanded with instructions as to such findings.

C. Findings and Order Causes Homeowner’s Prejudice

The Deed of Trust Act states:

Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale.

RCW 61.24.130(1). Further RCW 61.24.010 to .040 describe requisites to a trustee sale and qualification of successor trustee; and the statute necessarily requires that the status of beneficiary and trustee be properly conferred upon persons.

In deciding that Bank of America is a creditor and having a right to declare default and cause a non-judicial foreclosure, effectively decides matters properly challengeable under RCW 61.24.130 but not even brought before the court in this matter. In making its findings and order the trial court has deprived the Homeowners, without application of the fair, due and proper process, of offering counter arguments and facts to such status or rights and privileges implied; and such determination may subject them to collateral limitations or preclusion of issues in concurrent

or future judicial or nonjudicial settings, e.g., contesting a claim of a lien or restraint of sale.

D. Findings and Order Fail to Serve the Intent of the Rule and Equity

The fundamental guiding principle to vacating a judgment is:

[T]he overriding reason should be whether or not justice is being done. Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted. But justice might, at times, require a default or a delay. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.

Griggs v. Averbek, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). The secondary factors addressed by courts in motion to vacate default judgment are: (1) the diligence by the moving party following notice of the entry of default; and (2) the effect of vacating the judgment on the opposing party. *White*, 73 Wn.2d at 352; *Calhoun*, 46 Wn. App. at 618. Based on their categorization, these factors vary in significance. *Calhoun*, at 618. Where the defaulting party arrives at that position due to inexcusable circumstances, “equity necessitates that the bar be set higher,” which leads to an inquiry into strong or conclusive defenses. *TMT Bear Creek Shopping Center*, 140 Wn. App. at 205. If the defaulting party’s actions are willful, equity does not provide the party relief, even when the party has a “strong or virtually conclusive” defense to the claims. *Id.* at 206; *see White*, 73 Wn.2d at 352.

The defenses presented by the Homeowners to the motion to vacate judgment were Bank of America's diligence and timely appearance. The effect of vacating the judgment on the non-moving Homeowners may have collateral effect on defending against a foreclosure and/or determining the outcome of certain claims in the lawsuit. *See supra*. What is just and proper in a case vacating default judgment is placing the parties in a position of prior to the default order. Such is not served by progressing to findings of fact and ordering limitations on injunctive relief not requested by the parties. But, here the Court imposes such findings and ordered conditions. The Court should negate the order and remand with instructions.

E. Order is Ambiguous or Otherwise Lacks Clarity

Ambiguities in court orders must be reasonably interpreted. *See Seattle v. Edwards*, 87 Wn. App. 305, 309 (1997), *overruled, in part, on different grounds*, *City of Seattle v. May*, 171 Wn.2d 847, 256 P.3d 1161 (1997) (citing *State v. Williams*, 75 Wn.2d 604, 605-06, 453 P.2d 418 (1969), *overruled, in part, on different grounds*, *McRae v. State*, 88 Wn.2d 307, 9 P.2d 563 (1977)).

Additionally, the Bank of America shall cease and desist from non-judicial foreclosure unless and until such is authorized by the Court or this matter is no longer pending provided that Plaintiffs pay the monthly mortgage payment

due under the terms of the note commencing with the February 2012 payment.

Here the order is ambiguous on its face due to the syntax, i.e., the ordering of words and their relationship may have two meanings and it is unclear whether the condition of payment of the monthly mortgage applies to subsequent authorization of the court or only when the matter is no longer pending.

If such order does not constitute an abuse of discretion (as argued herein) then, in the alternative, the appellants request this Court remand the matter to the Court below to clarify its meaning.

V. CONCLUSION

For the foregoing reasons this court should vacate the findings and order below and remand the matter to the trial court with instructions. In the alternative, the appellants request this Court remand the matter to the Court below to clarify its meaning.

Respectfully submitted, this 16th day of July, 2012 in Arlington

Washington. By:



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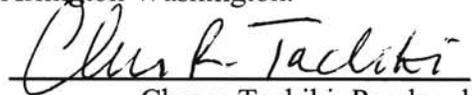
DECLARATION OF SERVICE

I, Chessa Tachiki, declare under the penalty of perjury that I served a copy of Appellant's Opening Brief on Respondent's attorneys by giving a true and correct copy of said document to a legal messenger for personal delivery to the following individuals:

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