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No. 43103-3-II

STATE OF WASHINGTON

BY ~~Cm~~ COURT OF APPEALS DIVISION TWO
~~DOFUM~~ STATE OF WASHINGTON

SHARIN R. METCALF and BRYAN BOOREN

Appellants

v.

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

Respondents

BRIEF OF RESPONDENT BANK OF AMERICA, N.A.

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I. INTRODUCTION

The Opening Brief is notable for what it does not contend. Appellants Sharon Metcalf and Bryan Booren (“Metcalf and Booren”) do not contest the trial court’s finding that Respondent Bank of America (“Bank of America”) had arguably meritorious defenses to their claims, that Bank of America’s failure to respond to their complaint was the result of excusable neglect, or that the default judgment should be vacated as a result. They were wise not to challenge that ruling, too, as the trial court’s decision was firmly anchored to controlling case law and the record.

Courts may and should set aside default judgments where defendants have meritorious defenses and default resulted from mistake or excusable neglect. In fact, given Washington’s overriding policy of adjudicating cases on the merits rather than by default, the existence of meritorious defenses alone is enough to vacate a default judgment with little need to review whether the default was excusable. Here, the record shows that Bank of America has a panoply of defenses to Metcalf and Booren’s claims—including, for instance, the statutes of limitations and the lack of any fiduciary or contractual duty as a matter of law—and it did not respond to the complaint because one of its former in-house counsel inadvertently failed to follow internal procedures and assign the matter to outside counsel for handling. So not only did Metcalf and Booren’s

Opening Brief waive any challenge to the trial court's ruling in this regard but, in any event, the trial court did not abuse its discretion in vacating the default judgment.

The Opening Brief is directed only at a narrow aspect of the trial court's order, specifically, its decision to enjoin foreclosure proceedings on the condition that Metcalf and Booren recommence mortgage payments. But courts may set aside default judgments under any terms they deem just and may not issue a preliminary injunction unless the applicant posts a bond, the amount of which the trial court has broad discretion to determine. Moreover, the statutory scheme requires Metcalf and Booren to resume their mortgage payments as a condition to staying foreclosure. The trial court's decision to condition the preliminary injunction on recommencement of mortgage payments was supported by record evidence, based on correct legal standards, and fell well within the range of acceptable choices given the applicable law. Accordingly, this aspect of the Order should also be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly exercise its discretion in granting Bank of America's motion to vacate the default judgment when (a) Metcalf and Booren failed to challenge that decision on appeal and (b) evidence showed that Bank of America had meritorious defenses to all

claims asserted in the complaint and Bank of America's failure to answer the complaint was due to mistake or inexcusable neglect? **Yes.**

2. Did the trial court properly condition the injunction of foreclosure proceedings, requested by Metcalf and Booren as part of the default judgment, on recommencement of Metcalf and Booren's mortgage payments? **Yes.**

III. COUNTERSTATEMENT OF THE FACTS

A. Metcalf and Booren Obtain a Mortgage Loan From Lender CFA Financial Services.

In January 2006, Metcalf and Booren obtained a \$360,000 mortgage to finance the purchase of real property located at 119 Mariposa Lane in Sequim, Washington (the "Property"), through a loan from CFA Financial Services, Inc. ("CFA"). CP 96-99, 200, 248. The Deed of Trust identifies Metcalf and Booren as the borrowers, CFA as the lender, Clallam Title Company as the trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary "solely as a nominee for Lender and Lenders' successor and assigns." *Id.* That same day, Metcalf and Booren obtained a second mortgage for \$90,000 from CFA Financial Services, Inc., also secured to the Property by a Deed of Trust. CP 119-20, 200, 248.

MERS' interest in the first Deed of Trust was subsequently assigned to BAC Home Loans Servicing, LP fka Countrywide Home

Loans Servicing, LP, to which Bank of America is successor by merger. That assignment was recorded in Clallam County on November 3, 2010. CP 126. Bank of America appointed ReconTrust Inc. as successor trustee under the first Deed of Trust. CP 128-29. In January 2009, Metcalf and Booren ceased making monthly mortgage payments, defaulting on the loan. CP 165, 176-83.

B. Metcalf and Booren Sue and Obtain a Default Judgment Against Bank of America.

In June 2010, before any foreclosure sale involving the Property, Metcalf and Booren sued Bank of America in Clallam County Superior Court, alleging claims for: (1) breach of contract/breach of covenant of good faith and fair dealing, (2) predatory lending, (3) bad faith/predatory lending practices, (4) fraud/misrepresentation, (5) unconscionable behavior, (6) contractual breach of the implied covenant of good faith and fair dealing, (7) breach of fiduciary duty, (8) elder abuse and consumer protection act violations, (9) conspiracy, and (10) intentional infliction of emotional distress. CP 246. All ten claims are premised on the allegation that Metcalf and Booren executed a loan they did not understand and could not afford. CP 246-60.

In August 2010, the summons and complaint were served on an Assistant Banking Center Manager of Bank of America's Edmonds

branch. CP 165, 210. Pursuant to internal procedures, the summons and complaint were routed to Bank of America's former Assistant General Counsel, Todd Boock, who inadvertently failed to assign handling of the matter to outside counsel. CP 165, 210. Metcalf and Booren also initiated several communications with Bank of America after filing their complaint, two of which requested a loan modification, but none of which indicated that suit had been filed or counsel retained. CP 166, 210. Bank of America operated under the belief that Metcalf and Booren intended to seek a loan modification and remained unaware of the pending litigation. CP 166, 210. As a result, Bank of America never responded to the complaint. CP 166, 210.

In June 2011, Bank of America transferred servicing of the first loan to an unrelated entity named Saxon Mortgage Services, Inc. CP 166-67, 201, 213.

In July 2011, Metcalf and Booren moved for entry of a default judgment against Bank of America that awarded damages, as well as injunctive relief to prevent any foreclosure sale of the Property. CP 234. The trial court granted the motion and entered a default judgment awarding \$537,000 in damages, which included \$491,000 for the construction of dwellings that would enable the Property to clear title. CP 221-22. The default judgment further enjoined Bank of America from

taking “action against [Metcalf and Booren] including issuing a notice of default and proceeding with foreclosure activity unless and until this default judgment is vacated or squashed.” CP 222. Bank of America did not receive notice of the default judgment until September 22, 2011, when it received a letter from Metcalf and Booren’s former counsel informing it of these proceedings and the default judgment. CP 55, 166, 185-90.

C. Bank of America Immediately Retains Counsel and Moves to Set Aside Default.

One day after receiving notice of the default judgment, Bank of America retained Lane Powell PC as counsel in this matter. CP 91. Counsel then promptly requested a copy of all pleadings and followed up with Metcalf and Booren’s former counsel to determine whether the parties could agree to set aside the default and avoid motion practice. CP 55, 201. Initially, Metcalf and Booren indicated they would agree to vacate the default judgment and Bank of America agreed to pay their reasonable attorney fees incurred in obtaining the default. CP 91-93, 211. But Metcalf and Booren ultimately refused to stipulate to vacate the default judgment. CP 92-93.

In November 2011, Bank of America moved under CR 55(c)(1) and CR 60(b)(1) to have the default judgment vacated on the grounds that (1) Bank of America had meritorious defenses to the complaint, including the statute of limitations, standing, the lack of a fiduciary duty, and the

lack of any breach of a contract by Bank of America; and (2) Bank of America's failure to respond to the complaint was the result of excusable neglect, namely, the inadvertent failure of its former in-house counsel to assign the matter to outside counsel for handling. CP 199, 203-09, 209-10. Metcalf and Booren's opposition did not challenge the existence of meritorious defenses, but contended only that Bank of America's failure to respond to the complaint was unjustified. CP 63-72. They argued that Bank of America's lack of a response was "willful and inexcusable neglect" and that Bank of America failed to act diligently upon receiving notice of entry of the default judgment. Metcalf and Booren further contended that the amount of damages awarded in the default judgment was reasonable. CP 66-69.

On January 20, 2012, the trial court issued an order granting the motion and vacating the default judgment. CP 43. The trial court ruled that Bank of America "presented arguably legally viable defenses to the Plaintiffs' complaint," and the failure to respond was attributed to the inadvertent failure of Bank of America's in-house counsel to assign the matter to outside counsel. CP 46-47. Moreover, it recognized Bank of America's due process right to assume that the default judgment would not exceed or substantially differ from the relief sought in the complaint. According to the trial court, while the complaint was broad enough to

contain the request for relief stated in the default judgment, “the specifics of that claim were not directly pled or addressed in the summons and complaint.” CP 46. The trial court also recognized that “the default judgment contemplates that at some point in time the injunction granted would likely be removed.” *Id.*

Bank of America was ordered to pay Metcalf and Booren’s attorney fees incurred in connection with both the default judgment and motion to vacate the default judgment (and Bank of America paid those fees just prior to the filing of the Notice of Appeal, as ordered and as requested by Metcalf and Booren). CP 48. Finding that Bank of America remained a creditor of Metcalf and Booren, the trial court then kept the injunction aspect of the default judgment in place and prohibited Bank of America from instituting foreclosure proceedings, provided that Metcalf and Booren resumed their monthly mortgage payments starting in February 2012. *Id.*

IV. ARGUMENT

A. The Standard of Review.

This Court reviews the trial court’s order vacating the default judgment under the abuse of discretion standard. *Caouette v. Martinez*, 71 Wn. App. 69, 77, 856 P.2d 725 (1993) (citing *Kennedy v. Sundown Speed Marine, Inc.*, 97 Wn. 2d 544, 548, 647 P.2d 30 (1982)). An abuse of

discretion occurs when a trial court's "decision is manifestly unreasonable or based on untenable grounds." *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993) (citing *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992); *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990)). "Three steps are included in this analysis: first, the court has acted on untenable grounds if its factual findings are unsupported by the record; second, the court has acted for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard; third, the court has acted unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard." *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citation omitted).

"[D]efault judgments are not favored in the law, thus a trial court's vacation of a default judgment is less likely to constitute abuse of discretion." *Caouette*, 71 Wn. App. at 77 (citing *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582 (1979)); see also *Showalter v. Wild Oats*, 124 Wn App. 506, 511, 101 P.3d 867 (2004) (Courts of Appeals "are less likely to reverse a trial court decision that sets aside a default judgment than a decision which does not.") (citation omitted). If the trial court's decision to set aside the default judgment "is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld." *Showalter*,

124 Wn App. at 510 (citing *In re Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999); quoting *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990)).

B. Metcalf and Booren Do Not Challenge the Trial Court's Decision to Vacate the Default Judgment and the Decision Was Correct in Any Event.

1. Metcalf and Booren Waived Any Argument That the Trial Court Abused Its Discretion in Finding Excusable Neglect or Vacating the Default Judgment as a Result.

The scope of Metcalf and Booren's appeal is narrow. They do not contend that the trial court abused its discretion in ruling that the default judgment should be vacated on grounds of excusable neglect. They challenge only the trial court's finding that Bank of America remained a creditor and the related holding staying foreclosure so long as Metcalf and Booren resume making their mortgage payments. AOB p. 1.¹ Bank of America's status as a creditor and a stay of foreclosure, however, are secondary issues that do not affect the threshold question of whether the trial court correctly vacated the default judgment on grounds of excusable neglect. In other words, the issue before this Court is not whether the default judgment should be vacated and the case allowed to proceed in the

¹ The body of Metcalf and Booren's brief matches the limited scope of their assignments of error. Throughout the brief, they continue to challenge the trial court's finding that Bank of America remains a creditor under the mortgage and its ruling staying foreclosure pending Metcalf and Booren's continued mortgage payments. (AOB 9-13) The brief nowhere challenges the finding of excusable neglect or resulting vacatur of the default judgment.

trial court. The only questions are whether and how foreclosure should be stayed while the trial court action proceeds.

By failing to address the threshold issue of vacating the default judgment in their opening brief, Metcalf and Booren waived any argument that the trial court's finding of excusable neglect was error or that the default judgment should be vacated as a result. *See* RAP 10.3(a)(3) (appellant's brief must contain "[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error"); *see also BC Tire Corp. v. GTE Directories Corp.*, 46 Wn. App. 351, 355, 730 P.2d 726 (1986) (appellate courts will not consider a claimed error where appellant fails to raise it in assignment of error or associated issue pertaining thereto, and in the absence of argument and citation to legal authority).

Nor can Metcalf and Booren raise any such argument for the first time in reply. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."); *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) ("We deny Mrs. Sacco's request for attorney fees because she raised this issue in the reply brief, not the opening brief. [citation] This court does not consider issues raised for the first time in a reply brief.").

The order vacating the default judgment should be affirmed for this reason alone.

2. The Trial Court's Order Vacating the Default Judgment Was Correct.

Waiver aside, the trial court did not abuse its discretion vacating the default judgment. As the trial court recognized, courts will set aside default judgments when a defendant shows (1) a meritorious defense to the claims alleged in the complaint and (2) that the default resulted from mistake, inadvertence, surprise, or excusable neglect. CP 45-47; *see also* CR 60(b)(1). “In determining what constitutes a sufficient excuse for neglect within the purview of the statute, courts look first to the showing made as to the existence of a meritorious defense . . . [a] conclusive defense requires little excuse on a prompt motion to vacate an order of default.” *Borg-Warner Acceptance Corp. v. McKinsey*, 71 Wn.2d 650, 652, 430 P.2d 584 (1967) (citations omitted); *see also, e.g., White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968) (where a strong, rather than merely prima facie defense exists, the court should spend “scant” time inquiring into the remaining factors, provided the defendant timely applied to vacate and defendant’s initial failure to appear was not willful); *State v. A.N.W. Seed Corp.*, 44 Wn. App. 604, 609, 722 P.2d 815 (1986).

Mere inattention or neglect, or willful disobedience of judicial deadlines, are not grounds to set aside a default judgment. *Larson v.*

Zabroski, 21 Wn.2d 572, 575, 152 P.2d 154 (1944). Less blameworthy conduct, however, does satisfy CR 60(b)(1)'s definition of "mistakes, inadvertence, [and] excusable neglect." *Id.*; see also *Leavitt v. DeYoung*, 43 Wn.2d 701, 706, 263 P.2d 592 (1953) (vacating default judgment where the defendant's attorney mislaid the case file and did not find it again until after the default judgment was entered); *White*, 73 Wn.2d at 355 (vacating default where the defendant's insurer failed to enter a notice of appearance because of a misunderstanding as to whether or not defendant would retain his own counsel prior to a determination of insurance coverage).

These rules reflect the overriding policy that courts should resolve controversies on the merits rather than by default. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979); see, e.g., *Showalter*, 124 Wn. App. at 510 ("Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits."); *Lee v. Western Processing Co., Inc.*, 35 Wn. App. 466, 468, 667 P.2d 638 (1983) ("The court should exercise its authority to the end that substantial rights be preserved and justice done between the parties.") (citation omitted).

Showalter is instructive. There, the plaintiff suffered damages as a result of a fall in a Wild Oats store and obtained a default judgment after Wild

Oats failed to respond to the complaint. *Showalter*, 124 Wn. App. at 508-09. Wild Oats sought to vacate the default judgment, presenting evidence that its legal department failed to follow internal protocols and did not assign the matter to outside counsel as a result. *Id.* at 509. Wild Oats also contended it had meritorious defenses to the plaintiff's claims, including foreseeability of the risk, preexisting injuries, and the amount of claimed damages. *Id.* at 513. The trial court vacated the default judgment and the Court of Appeals affirmed, reasoning that reinstating the default judgment would "unjustly deny Wild Oats a trial on the merits because it can assert substantial evidence of a defense to both liability and damages." *Id.* at 515.

So it is here. Metcalf and Booren's claims all pivot on allegations regarding the origination of their loan, including that their loan application misstated their income, proper underwriting standards were not used to evaluate and approve their loan, and that the loan terms were confusing. CP 246-260. As the trial court recognized, however, Bank of America has a panoply of meritorious defenses to these claims. These include:

Statute of Limitations. Metcalf and Booren's second claim alleges "predatory lending" in connection with their loan origination under the Truth in Lending Act ("TILA") and the Fair Debt Collection Practices Act ("FDCPA"). Both statutory schemes carry a one-year statute of limitations. *See* 15 U.S.C. § 1640(e) (2009) (TILA); 15 U.S.C. § 1692k(d)

(2010) (FDCPA). Metcalf and Booren originated their loan in January 2006, but did not file their complaint until four and a half years later in June 2010 and, thus, these claims are time barred.

The same is true of Metcalf and Booren's claims for common law fraud and violations of the Abuse of Vulnerable Adults statutes (RCW 74.34, *et seq.*). The statutes of limitations for those claims are three and four years, respectively. *See* RCW 4.16.080 (fraud); RCW 19.86.120 (AVA). But again, both claims pivot on allegations involving the origination of Metcalf and Booren's loan, while four-and-a-half years passed between origination and the filing of the complaint. Thus, these claims also are time-barred.

Lack of Duty or Breach. Even at the pleading stage, Metcalf and Booren's claims for breach of contract and breach of fiduciary duty are legally untenable. Metcalf and Booren alleged that certain misconduct in connection with the origination of their loans breached their loan agreement. In other words, they alleged that the formation and execution of the contract was somehow a breach of the contract itself. Putting aside the failure to allege exactly which provision in the loan agreement Bank of America supposedly breached in this regard, nothing in the law or common sense supports such a claim. Nor could Metcalf and Booren state a claim for breach of fiduciary duty since nothing in the complaint

elevated the parties' relationship beyond a standard lender-borrower one. See *Miller v. U.S. Bank of Wash.*, 72 Wn. App. 416, 426-27, 865 P.2d 536 (1994) ("The general rule in Washington is that a lender is not a fiduciary of its borrower; a special relationship must develop between a lender and a borrower before a fiduciary duty exists.") (citation omitted).

Unconscionability and Emotional Distress. There are two categories of contractual unconscionability, substantive and procedural. See *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 814, 225 P.3d 213 (2009). "Procedural unconscionability is 'the lack of meaningful choice, considering all the circumstances surrounding the transaction including " ' [t]he manner in which the contract was entered,' whether each party had 'a reasonable opportunity to understand the terms of the contract,' and whether 'the important terms [were] hidden in a maze of fine print.' " ' " *Satomi*, 167 Wn.2d at 814 (citations omitted). Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be "one-sided" or "overly harsh" (*id.* at 815 (citation omitted)) or "[s]hocking to the conscience, monstrously harsh, and exceedingly calloused." *Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention*, 16 Wn. App. 439, 444, 556 P.2d 552 (1976) (internal quotations and citations omitted).

An emotional distress claim must be predicated on conduct that is “so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 196, 66 P.3d 630 (2003); *see also Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 261, 928 P.2d 1127 (1997). A plaintiff is assumed to be “hardened to a certain degree of rough language, unkindness, and lack of consideration.” *Kloepfel*, 149 Wn.2d at 196. The tort of outrage does not encompass mere insults, indignities, threats, annoyances, or petty oppressions. *Id.* at 198.

Again, even at the pleading stage, both claims are legally untenable. Metcalf and Booren never alleged that any terms of the loan agreement shocked the conscience or were monstrously harsh, and they never alleged an absence of meaningful choice or that the key terms of the loan were hidden—nor could they, since the promissory note and Deed of Trust listed the principal amount of the loan, the maturity date of the loan, the interest rate and the monthly payment amount. CP 96-117 And the allegation that Metcalf and Booren received a loan they could not afford, even if true, falls well short of being “atrocious” or “utterly intolerable in a civilized society.”²

² Bank of America raised additional defenses in its briefing and will not repeat all of them here, particularly since Metcalf and Booren did not contest the existence of meritorious
(continued. . .)

Although the existence of these meritorious defenses alone warrants affirming the decision to vacate the default judgment (*see Borg-Warner*, 71 Wn. 2d at 652 (“[a] conclusive defense requires little excuse on a prompt motion to vacate an order of default”)), there is more. The record also shows that Bank of America’s failure to respond to the complaint was the result of excusable neglect. CP 44. Bank of America provided evidence that it had procedures in place by which in-house counsel assigned litigation matters to outside counsel. CP 201. Unfortunately, however, Bank of America’s former in-house counsel—who handled a high volume of cases—inadvertently neglected to follow those procedures, and Metcalf and Booren’s complaint was not assigned to outside counsel for preparation of a responsive pleading. CP 201, 210. That inadvertence was only compounded by multiple communications between the parties after the filing of the complaint regarding a potential loan modification. CP 201, 210. But as soon as Bank of America became aware of the default judgment it retained counsel, sought to stipulate to set

(. . .continued)

defenses below and do not contest their existence on appeal. Moreover, while Bank of America believes it will prevail on its defenses to all of Metcalf and Booren’s claims, it is not required to *prove* that it will succeed. The point is, as the trial court found, Bank of America has “arguably legally viable defenses” to Metcalf and Booren’s claims and should be allowed to litigate those defenses rather than suffer the entry of a default judgment. *See Showalter*, 459 Wn. App. at 515 (reinstating a vacated default judgment would “unjustly deny Wild Oats a trial on the merits because it can assert substantial evidence of a defense to both liability and damages”).

aside the default, and then filed a motion to vacate the default. CP 201-202, 210-211. As a result, the record supports a finding that Bank of America's failure to respond to the Complaint resulted from inadvertence, and not willful misconduct or mere inattention. CP 210.

Given all of this, Metcalf and Booren do not and cannot show that the trial court abused its discretion in vacating the default judgment. The trial court's factual findings were firmly tethered to the law and the record. Its decision to vacate the default judgment fell well within the range of acceptable choices provided under the relevant statute and the order vacating the default judgment should be affirmed.

C. The Trial Court Did Not Abuse Its Discretion in Enjoining Any Foreclosure Sale Provided That Metcalf and Booren Resumed Making Their Mortgage Payments.

Metcalf and Booren's only challenge to the trial court's order is that the trial court had no power to require them to make their mortgage payments as a condition to continuing the prohibition against foreclosure while the action is pending, and that the injunction is unfair in any event. AOB 10-11. These arguments can be quickly dispatched.

Courts have broad discretion to set aside default judgments "for good cause shown and upon such terms as the court deems just[.]" CR 55(c)(1). At the same time, "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum

as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” CR 65(c). Additionally, a plaintiff seeking to enjoin a trustee’s sale must pay the court clerk the sums that would be due on the obligation if the deed of trust was not being foreclosed. *See* RCW 61.24.130. And in the case of default in payments of principal, reserves, and interest, the borrower seeking an injunction must make those payments that would otherwise be due to the lender or loan servicer to the court clerk every 30 days. *See* RCW 61.24.130(a).

These statutes mean two things as far as the legal basis for the trial court’s ruling is concerned. First, the trial court was squarely within its power to set aside the default judgment “upon such terms as the court deems just” by keeping the injunction prohibiting foreclosure in place pending Metcalf and Booren recommencing their mortgage payments. Second, the preliminary injunction statute requires the posting of a bond prerequisite before the issuance of a preliminary injunction, in an amount falling within the trial court’s broad discretion. More to the point, borrowers seeking to enjoin a trustee’s sale—which Metcalf and Booren requested as part of the default judgment—must deposit with the court clerk the amounts monthly due on the loan. The trial court’s ruling thus fell squarely within the range of acceptable choices under the governing

law and, in fact, to continue to enjoin the foreclosure, the trial court was required to direct Metcalf and Booren to resume making those payments.

Metcalf and Booren nowhere discuss these rules, but instead point to broad principles of equity in requesting reversal of this one aspect of the trial court's order. AOB 9-13. Yet they cite to no case that stands for their remarkable proposition, namely, that courts have the equitable power to disregard statutes requiring payments of the exact type ordered. *See, TMT Bear Creek Shopping Center, Inc., v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 205, 165 P.3d 1271 (2007) (defaulting party did not have strong defenses to the plaintiff's claims and neglect in failing to respond to the complaint was inexcusable).

Finally, Metcalf and Booren complain that the trial court made an improper factual finding that Bank of America was their creditor, which served as the basis for requiring them to post monthly mortgage payments as a condition to staying foreclosure. This argument goes nowhere. For one thing, the trial court did not conclusively find that Bank of America remained a creditor and had the right to foreclose. AOB 10. On the contrary, the trial court recognized that the mortgage might at some point be deemed invalid under Metcalf and Booren's complaint. CP 46. For another, the statutory scheme—not any purported “finding” that Bank of America was a creditor—authorizes the trial court's decision to require

mortgage payments as a condition to staying foreclosure. Whether Bank of America is a creditor has no bearing on these statutory requirements.³

The bottom line is that the trial court acted well within its discretion in requiring Metcalf and Booren to continue to make mortgage payments as a condition to enjoining foreclosure. Accordingly, this aspect of the trial court's order should be affirmed as well.

V. CONCLUSION

Metcalf and Booren have waived any challenge to the trial court's finding of excusable neglect and its conclusion that the default judgment should be vacated as a result. Their decision not to raise that challenge makes sense, given the existence of several meritorious claims and the record evidence showing that Bank of America's failure to respond was the result of excusable neglect. Moreover, Metcalf and Booren have failed to show how the trial court abused its discretion in requiring them to make

³ Bank of America submitted evidence that it had transferred the servicing of Metcalf and Booren's loan to another entity. CP 166-67, 201, 213. Further, Metcalf and Booren had the option to make payments into the Court's Registry, which Bank of America proposed more than two months prior to the filing of the Opening Brief and before any dispute as to the method of payment proposed by the trial court had been voiced by Metcalf and Booren. As such, Metcalf and Booren cannot reasonably assert any basis in equity and, as set forth above, Bank of America's status as a creditor, or a loan servicer for that matter, has no bearing on the statutory requirement that Metcalf and Booren post their mortgage payments as a precondition to staying foreclosure. Bank of America further asserts its right to challenge Metcalf and Booren's complaint on the grounds that it is not a proper defendant in this action.

mortgage payments as a condition to enjoining foreclosure. The order should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 12th day of October, 2012.

LANE POWELL PC

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2012, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

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

Executed on this 12th day of October, 2012, at Seattle, Washington.



Leah Burrus