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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II
SUPERIOR COURT NO. 16-2-04401-34**

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Appellant,

vs.

RORY SKINNER, ROSEMARIE SKINNER,
OCCUPANTS OF SUBJECT LOT 6 REAL PROPERTY; and DOES 1-10,
Respondents

REPLY BRIEF OF APPELLANT

FEDERAL NATIONAL MORTGAGE ASSOCIATION

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT1

 A. Skinners’ newly raised challenge to personal jurisdiction is untimely and waived under CR 12.....2

 B. The Skinners have never held an ownership interest in the subject property, and the Deeds of Trust Act does not require that foreclosure notices be transmitted to the Skinners.....4

 C. The standard for vacating a default judgment does not apply to vacating a summary judgment, even when the summary judgment is unopposed6

 D. Since the Skinners erroneously presented the standard applicable to vacating a default judgment, and did not meet the showing required for vacating a summary judgment, the trial court erred in vacating the summary judgment11

III. CONCLUSION13

TABLE OF AUTHORITIES

Washington Case Law

Barr v. MacGugan, 119 Wash. App. 43, 78 P.3d 660 (2003).....7

Boyd v. Kulczyk, 115 Wash. App. 411, (Div. 3 2003)3

Flannagan v. Flannagan, 42 Wn. App. 214 (1985)10, 11

Graves v. P.J. Taggares Co., 94 Wn.2d 298 (1980).....7, 8, 9, 11, 12

Ha v. Signal Elec., Inc., 182 Wn. App. 436 (2014)9

Haller v. Wallis, 89 Wn.2d 539 (1978).....7, 8, 9, 11, 12

Lane v. Brown & Haley, 81 Wn. App. 102 (1996).....7, 8, 9, 11

Shandola v. Henry, 198 Wn. App. 889 (2017)10, 11

State ex rel. Coughlin v. Jenkins, 102 Wash. App 60, (Div. 2 2000)3

White v. Holm, 73 Wn.2d 348 (1968).....6, 8, 12

Winstone v. Winstone, 40 Wash. 272 (1905).....7

Statutes

RCW 61.24.0055

RCW 61.24.0305

RCW 61.24.040(b)5

RCW 64.04.010 4

RCW 64.04.030 4

Other Authorities

Civil Rule 112

Civil Rule 122

Civil Rule 12(b)1, 2, 3, 4

Civil Rule 12(g)1, 2, 3, 4

Civil Rule 12 (h)1, 2, 3, 4

Civil Rule 60(b)..... 12

Civil Rule 60(b)(1)..... 1, 11

Civil Rule 60 (b)(5).....1, 12

Civil Rule 60(b)(11).....1, 11

I. INTRODUCTION

The Appellant, Federal National Mortgage Association (“Fannie Mae”), submits this reply brief addressing the response brief of Rory and Rosemarie Skinner (“Skinners”). The Skinners’ response brief rests on four main arguments that: (1) Skinners may raise a challenge to personal jurisdiction, (2) Skinners have owned the subject property and were entitled to be transmitted foreclosure notices, (3) the applicable standard for vacating an unopposed summary judgment is that which applies to a default judgment, and (4) under the previous three assumptions, the trial court properly vacated the Summary Judgment, granted on August 25, 2017, based on CR 60(b) (1), (5) and (11).

Fannie Mae submits that the Skinners response brief presents erroneous assumptions and arguments. (1) The Skinners may not raise a challenge to personal jurisdiction, as such a challenge is untimely and waived under CR 12 (b), (g) and (h). (2) The Skinners have never held an ownership interest in the subject property, and thus under the Deeds of Trust Act were not entitled to notice of the foreclosure. (3) The Supreme Court has held that the applicable standard for vacating a summary judgment, even one that is unopposed, is not the same as that which applies to vacating a default judgment. (4) For these reasons, the trial court erred in vacating the Summary Judgment of August 25, 2017, under CR 60(b)(1), (5) or (11). Fannie Mae respectfully requests that this Court reverse and remand.

II. ARGUMENT

Fannie Mae will address the arguments set forth in the Skinners’ response brief below.

///

A. Skinners' newly raised challenge to personal jurisdiction is untimely and waived under CR 12.

Only on appeal do the Skinners argue, for the first time, that they may raise a challenge to personal jurisdiction, and thus may challenge Fannie Mae's summary judgment based thereon.

"Further, the record indicates that Respondents may have grounds to challenge the legitimacy of the summary judgment proceeding under lack of personal jurisdiction, as there is no record that the Skinners were ever personally served with the Summons and Complaint in this Lawsuit. CP 411. Respondents may raise the issue of jurisdiction at any time..." Brief of Respondents, p. 13.

A challenge to personal jurisdiction or sufficiency of service of process is governed by Civil Rule 12. Civil Rule 12(b) requires that every defense or claim for relief be asserted in the responsive pleading, except that certain defenses, such as lack of personal jurisdiction and insufficiency of service of process may be pleaded by motion, at the pleader's option. If said defenses are pleaded by motion, available defenses and motions need to be joined and consolidated under CR 12(g). If said defenses are not pleaded in a responsive pleading or a motion, they are waived under CR 12(h).

In this case the Summons and Complaint packet were served on the Skinners' attorney at the time, David Britton ("Attorney Britton"), as the attorney authorized to accept service. A registered process server personally handed the Summons and Complaint packet to Attorney Britton, as the attorney authorized to accept service, and subsequently filed Declarations of Service with the Superior court. CP 85-87. Each Declaration of Service states that the documents were personally delivered into the hands of David Britton, attorney authorized to accept.

In January 2017, Attorney Britton filed an Answer to the Complaint with affirmative defenses. The filed Answer however, does not contain affirmative defenses of lack of jurisdiction over the person or insufficiency of service of process. CP 88-93.

Approximately one year later, the Skinners' current counsel filed an Amended Answer to the Complaint containing affirmative defenses. Once more, the Amended Answer does not list affirmative defenses of lack of personal jurisdiction or insufficiency of service of process. CP 478-483. Neither Attorney Britton nor the Skinners' current counsel has filed a motion raising a challenge to personal jurisdiction or sufficiency of service of process, although the former and current counsels have filed numerous other pleadings with the trial court.

Washington cases have consistently held that a challenge to personal jurisdiction needs to be asserted with a motion, prior to filing an answer, or in the answer itself. Failure to raise such a challenge by motion or answer is deemed a waiver under CR 12(b), (g), and (h). *Boyd v. Kulczyk*, 115 Wash. App. 411, (Div. 3 2003) (defendant's attempt to challenge service of process, for the first time, following an arbitration award in favor of plaintiff, without having listed the defense in the answer, was too late.); *State ex rel. Coughlin v. Jenkins*, 102 Wash. App 60, (Div. 2 2000) (putative father who appeared by communicating with the prosecuting attorney, but did not file any responsive pleading, waived potential challenge to service of process.).

The argument of raising a challenge to personal jurisdiction, at this stage of litigation, appears to be an afterthought. The process server's Declaration of Service contains language stating that Attorney Britton was authorized to accept service and said

Declarations are filed with the Court. CP 85-87. Any challenge to personal jurisdiction is untimely under CR 12(b) and (g), and is waived under CR 12(h).

B. The Skinners have never held an ownership interest in the subject property, and the Deeds of Trust Act does not require that foreclosure notices be transmitted to the Skinners.

The Skinners' response brief represents that the Skinners owned the subject property for over 12 years, (Brief of Respondents, p. 16.), when in fact, the Skinners have never held an ownership interest in the property which is the subject of this action. Per RCW 64.04.010, every conveyance of real estate or any interest therein shall be by deed. The form and content of a warranty deed are governed by RCW 64.04.030, which requires that a warranty deed contain a legal description of the real estate. A warranty deed complying with RCW 64.04.030 conveys a fee simple interest to the grantee listed therein, and his or her heirs or assigns. RCW 64.04.030 does not require that a physical address be listed, nor is it custom and practice to include a physical address in a warranty deed. The legal description of the property is the governing identifier.

In this case, the warranty deed to the Skinners legally describes the property known as Lot 7, while the warranty deed to Craig and Wendy Baldwin legally describes the property known as Lot 6. CP 220-224. While the Skinners have owned Lot 7, since November 2006, and continue to own the same, the Skinners have never held an ownership interest in Lot 6, which is the subject of this action, as no deed has conveyed an interest in Lot 6 to the Skinners.

Likewise, the Skinners' argument that they were entitled to be transmitted notices of foreclosure is a legal fallacy. The Deeds of Trust Act governs how and to whom

foreclosure notices need to be transmitted. Per RCW 61.24.030 subsection (8), a Notice of Default needs to be transmitted to the borrower and grantor, at their last known address. Per the definitions listed in RCW 61.24.005, a borrower is a person obligated for the debt secured with the deed of trust, and a grantor is a person who signs a deed of trust. By definition, the borrowers and grantors for the foreclosing loan and deed of trust, were Craig and Wendy Baldwin. Per the Deeds of Trust Act, the Skinners, who are strangers to the foreclosing mortgage loan, taken out by Craig and Wendy Baldwin, are not entitled to be transmitted a Notice of Default.

The only record before this Court shows the Notice of Default was properly transmitted to a few known addresses for Craig and Wendy Baldwin, the only parties entitled to the Notice of Default. CP 280-281.

Furthermore, RCW 61.24.030 (8) requires that, in addition to the mailing described above, the Notice of Default be posted in a conspicuous place on the premises, or personally served on the borrower and grantor. Once again, the only record before this Court establishes that the Notice of Default was personally served on the borrower and grantor, or, posted on the real property described as Lot 6, in compliance with RCW 61.24.030(8). CP 281.

The single document before this Court—the Notice of Trustee Sale—on which the Skinners base their foreclosure notice argument, contains information limited to the transmittal of the Notice of Default, and does not contain any information relevant to the transmittal of the Notice of Sale. CP 278-283. Nonetheless, per the Deeds of Trust Act, specifically, RCW 61.24.040(b), the Skinners do not fall in the category of persons entitled to be transmitted a Notice of Sale. The Skinners are strangers to the foreclosing

mortgage loan, taken out by the borrowers and grantors, Craig and Wendy Baldwin. Moreover, the Skinners do not hold an interest in Lot 6, recorded subsequent to the foreclosing deed of trust. As such, the Skinners do not fall in the category of those entitled to be transmitted a Notice of Sale, under the statute.

The Skinners' response brief additionally contends that the Notice of Trustee Sale was not properly posted. Factually, the Skinners have not offered any record before this Court that shows how the Notice of Trustee Sale was transmitted or posted. The only record before this Court is relevant to transmitting the Notice of Default, and such record on its face shows a transmittal in compliance with the Deeds of Trust Act. CP 278-283.

The Skinners' argument regarding their entitlement to foreclosure notices is legally unsound as well as factually unsupported and speculative. The assumptions and arguments on which the Skinners rest their response brief are legally fallacious, including the contention that the applicable standard for vacating an unopposed summary judgment is that which applies to vacating a default judgment, as further detailed below.

C. The standard for vacating a default judgment does not apply to vacating a summary judgment, even when the summary judgment is unopposed.

In its appellant brief Fannie Mae has explained in detail that Washington Courts distinguish between vacating a default judgment, and vacating a non-default judgment. The distinguishing factor between the two types is whether an attorney has appeared for the party seeking to vacate, and a ruling other than a default judgment has entered.

If no attorney has appeared in the action and a defaulted party seeks to vacate a thereafter entered default judgment, the Supreme Court in *White v. Holm*, 73 Wn.2d 348 (1968), has established the standard that applies for vacating that default judgment.

However, if an attorney has appeared for a party, and a ruling other than a default judgment has entered, then the party seeking to vacate a non-default judgment needs to meet a different standard. See *Winstone v. Winstone*, 40 Wash. 272 (1905).¹

When a party represented by counsel, seeks to vacate a non-default judgment, due to the conduct of the party's own counsel, the Supreme Court in *Haller v. Wallis*, 89 Wn.2d 539 (1978), has established the applicable standard. The *Haller* ruling requires a showing that the attorney's conduct was induced by fraud or collusion of the adverse party. Under *Haller* mere negligent conduct or erroneous legal advice is not sufficient ground for vacating a judgment.

While the judgment before the *Haller* Court was a consent judgment, the Court of Appeals has interpreted that the *Haller* standard is not limited to consent judgments, but broadly applies to non-default judgments, specifically a summary judgment. *Lane v. Brown & Haley*, 81 Wn. App. 102 (1996); *Barr v. MacGugan*, 119 Wash.App. 43, (2003).²

Additionally, the Supreme Court in *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298 (1980), has carved a narrow exception to the *Haller* standard, holding that under extraordinary circumstances when an attorney surrenders substantial rights of a client, a (non-default) judgment may be vacated.³ A party seeking to vacate a non-default judgment, due to the conduct of the party's own counsel, needs to meet the *Haller* standard, by showing that the attorney's action was induced by fraud or collusion of an

¹ The Supreme Court has long recognized the general rule that the incompetence or neglect of a party's own attorney is not sufficient ground for vacating a judgment.

² At issue before the *Barr* court was an order of dismissal.

³ The *Graves* Court considered both a summary judgment on one issue, and a judgment following trial, on the remaining issues. *Graves* at 300.

adverse party, or needs to fit within the *Graves* exception, by showing that the attorney surrendered a substantial right.

In its appellant brief Fannie Mae explained that the four factors argued by the Skinners in their motion to vacate the summary judgment are the factors set forth in *White*, applicable to a default judgment, and hence, an erroneous standard. The correct standard to apply when vacating a non-default judgment, such as a summary judgment, is that set forth by *Haller* and *Graves*.

In their response brief, the Skinners continue to argue the four factors set forth in *White*, and continue to rely on the same, even though said factors expressly apply only to a default judgment. In support of their application of the *White* standard, (inapplicable to a summary judgment), the Skinners argue that *Haller* and *Lane* should only apply when the attorney for the party seeking to vacate has appeared and addressed the merits of the case. Brief of Respondents, pp. 10-11. The Skinners further assert that an “Unopposed summary judgment, as occurred here, is much closer to a default and it is certainly not a decision on the merits.” Brief of Respondents, pp. 12-13.

The flaw with the Skinners’ reasoning is that no Washington court has ever held that, when a party is represented by an attorney, and the attorney does not defend a motion for summary judgment, the standard applicable to vacating the summary judgment is that which applies to a default judgment. The Washington courts have in fact, held otherwise.

The Court in *Graves* considered both a summary judgment on one issue, and a judgment after trial on remaining issues. *Graves* at 300. Similar to Attorney Britton, the attorney in *Graves* did not notify his client of the summary judgment hearing, did not oppose the same, and did not attend the hearing. *Id.* Yet the *Graves* Court did not

consider the unopposed summary judgment as akin to a default judgment, and did not apply the standard applicable to a default judgment. *Graves* at 302, 303.

The *Graves* Court further did not deem that the unopposed summary judgment amounted to a waiver of substantial rights. *Id.* The behavior that the *Graves* Court deemed constituted a waiver of substantial rights was the attorney's entering into unauthorized stipulations. *Graves* at 303, 304, 305.

Similarly, the attorney in the *Lane* case did not notify his client of the summary judgment hearing, and did not present all available defense arguments in opposition to the summary judgment. *Lane* at 104, 106. Under such a scenario the *Lane* Court applied the *Haller* and *Graves* standards, and not the standard applicable to a default judgment.

There simply is no existing case law supporting the Skinner's contention that an unopposed summary judgment is akin to a default judgment, and the default judgment standard should apply. Factually, Attorney Britton did appear on behalf of Skinners, (CP 94-95), did file pleadings including an Answer, (CP 88-93, 96-109), and did assess the merit of the case, as the record before this Court shows. CP 105-6.

None of the cases cited by the Skinners in their response brief supports their contention that an unopposed summary judgment is akin to a default judgment, and the standard applicable to vacating a default judgment needs to apply. The response brief cites from *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436 (2014). What was before the court in *Ha* was an actual default judgment, entered because no attorney had ever appeared on behalf of the defaulted defendant. The court in *Ha* correctly applied the standard applicable to a default judgment as what was before the court was a default judgment, and not a summary judgment.

The Skinners' response brief further asserts that "The United States Supreme Court has held that CR 60(b)(11) vests in court the authority enabling them to vacate judgments "whenever such action is appropriate to accomplish justice." Id. at 221." Brief of Respondents, pp. 14-15. It is unclear which U.S. Supreme Court case the Skinners reference, as none is cited in their response brief. The "Id. at 221" relates back to their cited case of *Flannagan v. Flannagan*, 42 Wn. App. 214 (1985). *Flannagan* is a Washington appellate case considering a dissolution action. In *Flannagan* a dissolution decree had entered awarding military retirement to the husband. *Flannagan* at 216. Thereafter, the Uniformed Services Former Spouses Protection Act became effective, allowing for a division of military retirement payments between husband and wife. The wife in *Flannagan* sought to vacate the divorce decree to apply the new law retroactively. Id. *Flannagan* does not stand for the premise that the standard for vacating a default judgment should be applied when vacating an unopposed summary judgment.

The case of *Shandola v. Henry*, 198 Wn. App. 889 (2017), cited by Skinners in their response brief is another Washington appellate case where a plaintiff's lawsuit was dismissed and judgment was entered in favor of defendants based on the anti-SLAPP statute. After the judgment had entered, the Washington Supreme Court ruled that the anti-SLAPP statute was unconstitutional and invalid. Thereafter the *Shandola* plaintiff sought to vacate the judgment based on the new Supreme Court ruling. *Shandola* at 892. The *Shandola* case likewise does not support the Skinners' premise that the standard for vacating a default judgment should be applied when vacating an unopposed summary judgment. Nor has any relevant new law taken effect since Fannie Mae's summary

judgment was granted, therefore, the circumstances in *Flannagan* and *Shandola* are not on point here.

The Skinners argued the incorrect standard in their motion to vacate and their response brief, and did not endeavor to show or meet the applicable standard set forth in *Haller*, *Graves* and *Lane*. The trial court vacated the summary judgment based on the Skinners' incorrect standard, and thus erred.

D. Since the Skinners erroneously presented the standard applicable to vacating a default judgment, and did not meet the showing required for vacating a summary judgment, the trial court erred in vacating the summary judgment.

In their response brief the Skinners argue that they have shown the four factors of (1) substantial evidence supporting a prima facie defense; (2) the failure to appear and answer was due to mistake, inadvertence, surprise or excusable neglect; (3) the defendant acted with due diligence, and (4) plaintiff will not suffer substantial harm. Brief of Respondents, pp. 9, 13, 14.

Fundamentally, these four factors are inapplicable to vacating a summary judgment. The Skinners have not met the legal standards necessary to relieve them from the conduct of their own attorney. Under *Haller*, the Skinners have not shown that Attorney Britton's conduct was induced by fraud or collusion of an adverse party. Additionally, under *Graves*, they have not shown that Attorney Britton's not defending the motion for summary judgment rises to the level of surrendering a substantial right.

The trial court erroneously vacated the summary judgment under CR 60(b)(1) and (11), as the conduct of Attorney Britton was subject to a showing of attorney action

induced by fraud or collusion, under the *Haller* standard, and did not rise to the level of surrendering a substantial right, as set forth in *Graves*.

The trial court further erred in vacating the summary judgment under CR 60(b)(5) , as the Skinners' presented defenses that they were the owners of the subject property and thus were entitled to be transmitted foreclosure notices were legally unsound and factually unsupported. The Skinners' challenge to personal jurisdiction is newly raised on appeal and has been waived, as explained in section "A" above.

The trial court likewise erred in vacating the summary judgment under CR 1, in the general interest of justice. The decisions of the Supreme Court in *White*, *Haller*, and *Graves* are binding on the trial court, and CR 1 is to be construed consistent with the Supreme Court rulings, not in lieu thereof.

Lastly, the trial court erred in vacating the summary judgment without awarding any terms to Fannie Mae. While CR 60(b) authorizes awarding terms, the *Graves* ruling expressly requires terms under these circumstances. *Graves* at 306. The Supreme Court in *Graves* has clearly stated that if a party's attorney's conduct rises to the level of surrendering a substantial right, warranting vacating a judgment, then terms are to be awarded to the plaintiff. *Id.*

The Skinners' response brief argues that no evidence of monetary damage to Fannie Mae has been presented. Brief of Respondents, p. 21. On the contrary, monetary damage to Fannie Mae has been shown with calculation and supported by the record before this Court. CP 514-516. The record before this Court shows that Skinners' current counsel substituted in the action on November 15, 2017, (CP 301-302), and filed a motion to vacate on December 13, 2017. CP 389-404. The record before this Court shows that

Fannie Mae's cash for keys offer to the Skinners' tenants completed on or before December 4, 2017. CP 515, 525-533. The record before this Court is void of any communication from the Skinners' current counsel to Fannie Mae's counsel, prior to the filing of the motion to vacate on December 13, 2017.

If the Skinners' current counsel had notified counsel for Fannie Mae of the Skinners' intention to challenge the summary judgment, prior to filing their motion to vacate, Fannie Mae would have had an opportunity to halt the \$8,000 cash for keys transaction, halt the marketing efforts that followed, prevent the property from becoming vacant requiring heightened preservation, and prevent the loss of the stream of rental income from the tenants. Fannie Mae would have further had an opportunity to attempt to resolve informally, before the need for immediate and additional litigation arose.

The Skinners' conduct deprived Fannie Mae of the opportunity to mitigate additional and substantial monetary damages, which Fannie Mae incurred. The Skinners cannot point the finger at their former counsel, or any third party, for their failure to notify Fannie Mae of their intention to challenge the summary judgment during the period from November 15 to December 13, 2017. The Rules of Professional Conduct equally would have called for a courtesy notice to Fannie Mae's counsel, before blindsiding with a motion to vacate, during the holiday season. The trial court lacked basis in civil rule or case law to withhold an award of terms to Fannie Mae.

III. CONCLUSION

The Skinners contend that they have owned the subject Lot 6, when at all times they have held a fee simple title to Lot 7 (which is not the subject of this action), and have

merely held a possessory interest in Lot 6. The owners of the subject Lot 6 have been Craig and Wendy Baldwin, followed by Fannie Mae.

The Skinners further assert that they were not transmitted foreclosure notices. The Skinners do not fall in the category of those entitled to be transmitted foreclosure notices under the Deeds of Trust Act.

The Skinners additionally argue that they can raise a challenge to personal jurisdiction for the first time on appeal, when they did not file a pre-answer motion asserting said challenge and failed to include said defense in their Answer and Amended Answer.

The Skinners maintain that the applicable standard for vacating an unopposed summary judgment is that which applies to vacating a default judgment. The Skinners have argued the incorrect standard in their motion to vacate and in their response brief. The Skinners have neither pleaded nor shown that they have met the applicable standard for vacating a summary judgment.

The trial court erred in vacating the summary judgment based on the arguments raised by the Skinners, and based on their incorrect standard. The trial court further erred by not awarding any terms to Fannie Mae. Fannie Mae respectfully requests that the Court reverse and remand with appropriate instructions.

MCCARTHY HOLTHUS, LLP

Dated: August 1, 2018

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CERTIFICATE OF SERVICE

I hereby certify that August 1, 2018, I electronically filed the foregoing **REPLY BRIEF OF APPELLANT, FEDERAL NATIONAL MORTGAGE ASSOCIATION**, and this Certificate of Service, with the Clerk of the Court, using the Washington State Appellate Court’s Portal for e-filing, which will serve electronic copies of such filing on the following attorneys of record:

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Dated this 1st day of August, 2018

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