

69124-4

69124-4

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 APR 24 PM 3:50

No. 69124-4-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

ANUP KHELA, an individual,

Respondent,

v.

KALEN PETERS, QUALITY LOAN SERVICE CORPORATION OF
WASHINGTON, INC., ASSET MANAGEMENT HOLDINGS, LLC,
AND DOES 1 through 20,

Appellant.

APPELLANT'S BRIEF

BADGLEY MULLINS TURNER PLLC
Duncan C. Turner, WSBA No. 20597
Daniel A. Rogers, WSBA No. 46372
Attorney for Appellant

19929 Ballinger Way NE, Suite 200
Shoreline, Washington 98155
Telephone: (206) 621-6566
Facsimile: (206) 621-9686

Table of Contents

I. INTRODUCTION	4
II. ASSIGNMENTS OF ERROR	5
III. STATEMENT OF THE CASE	5
A. Not Only Was the Notice of Intent to Withdraw as Counsel for AMH Defective, but AMH Was Never Served a Copy of the Default Papers.....	6
B. Facts Relating to the Plaintiff’s Mortgages and 10 AMH’s Foreclosure of Its Second Position Mortgage, Which Gave Rise to the Plaintiff’s Allegations in This Action.....	9
C. AMH Acted With Due Diligence Upon Notice of the Entry of Default Against It When Plaintiff Sought Domestication of the Default Judgment in Florida.	13
IV. ARGUMENT	14
A. Standard on Review.....	14
B. The Trial Court Misapplied the Standard to Set Aside a Default Judgment.....	15
1. The Trial Court Did Not Give Proper Weight to AMH’s Strong Defense Against the Plaintiff’s Claims.	16
2. The Superior Court Imputed the Negligence of McCarthy & Holthus to AMH.	20

3.	The Trial Court Confused AMH’s Diligence After Notice of the Default Judgment with Its Failure to Immediately Seek New Counsel.	22
4.	The Superior Court Held That the Plaintiff Having to Defend this Matter on the Merits Was “Substantial Hardship.”	23
D.	The Trial Court Failed to Consider AMH’s Failure to Receive Notice Pursuant CR 55.	25
V.	CONCLUSION	26

Cases

<i>Gutz v. Johnson</i> , 128 Wn. App. 901, 117 P.3d 390, (2005).....	14, 24, 25
<i>Kain v. Sylvester</i> , 62 Wn. 151, 113 P. 573 (1911).....	20
<i>Leavitt v. DeYoung</i> , 43 Wn. 2d 701, 263 P.2d 592 (1953).....	20
<i>Pfaff v. State Farm Mutual Auto. Ins. Co.</i> , 103 Wn. App. 829, 14 P.3d 837, (2000).....	24
<i>Schwarzmann v. Association of Apartment Owners of Bridgehaven</i> , 33 Wn. App. 397, 655 P.2d 1177 (1982).....	19
<i>White v. Holm</i> , 73 Wn. 2d 348, , 438 P.2d 581, (1968).....	15, 16, 17, 20, 22, 23, 24

Rules

CR 55.....	5
CR 60.....	14

I. INTRODUCTION

Defendant Asset Management Holdings, LLC (“AMH”) seeks review of the King County Superior Court’s denial of its Motion to Set Aside the Entry of Default and Vacate the Default Judgment. AMH was represented by counsel in this action, but did not receive notice of the default proceedings that the Plaintiff commenced against it. Nor did it learn of the default judgment entered by the Superior Court on November 15, 2010 until mid-February 2012, when the Plaintiff attempted to domesticate the default judgment in Florida.

AMH did not receive notice of the default proceedings against it because its attorneys of record had not filed a notice of intent to withdraw and the Plaintiff’s subsequent attempt to serve AMH by mailing the default pleadings to AMH was returned to the Plaintiff as “undeliverable” or sent to an incorrect address.

Had AMH been provided notice of the default proceedings, it would have presented a strong defense to the allegations made against it by the Plaintiff. Although the Plaintiff alleged that AMH, *inter alia*, wrongfully foreclosed on her property, AMH was acting well within its rights under the Deed of Trust that it was servicing for another defendant in this action, 10 Asset Management Holdings, LLC (“10 AMH”), a

wholly unrelated entity. As a result, it is unlikely that the Plaintiff would have succeeded in obtaining a judgment against AMH had its attorneys of record forwarded the default proceedings to it and/or had the Plaintiff properly served AMH with notice of the default proceedings.

II. ASSIGNMENTS OF ERROR

A. The Trial court erred in failing to assign proper weight to AMH's strong defense to Plaintiff's claims and the negligent conduct of AMH's attorneys of record, the primary factors of the *Holm* test.

B. The trial court erred in its application of the four factors of the *Holm* test.

C. The trial court erred by not vacating the default as a matter of right under CR 55.

III. STATEMENT OF THE CASE

As the procedural posture and relevant facts of this matter are complicated and interrelated, for ease of reading this statement of the case it is organized as follows: (A) facts regarding the procedural history of this action, detailing the improper manner by which the Plaintiff obtained a default judgment against AMH; (B) background facts regarding the Plaintiff's two mortgages and the foreclosure of one of those mortgages, which led to the allegations the Plaintiff made in this action; and (C) the events that transpired following the entry of the default judgment against

AMH, through which AMH learned that it had been defaulted and subsequently brought the Motion to Set Aside Entry of Default and Vacate Default Judgment.

A. Not Only Was the Notice of Intent to Withdraw as Counsel for AMH Defective, but AMH Was Never Served a Copy of the Default Papers.

The Plaintiff filed this action on November 19, 2008, alleging, among other things, that she had suffered damages resulting from the foreclosure of her home by AMH, which was servicing a Deed of Trust held by 10 AMH. CP 1-14 (Summons & Complaint, Dkt. #1). As a result of this suit being filed, on January 2, 2009, attorneys Matthew Cleverley and Lucy Gilbert of the law firm McCarthy & Holthus filed a Notice of Appearance on behalf of AMH and 10 AMH. CP 173-175 (Dkt. #19A). These same attorneys also appeared on behalf of another defendant, Quality Loan Services Corporation of Washington (“QLS”).¹ CP 26-27 (Dkt. #5).

On September 24, 2009, McCarthy & Holthus informed AMH and 10 AMH that it intended to withdraw from representing them, however, it provided them with a corresponding notice of intent to withdraw that on

¹ QLS, through its counsel at McCarthy Holthus, later settled with the Plaintiff in this matter and the Plaintiff’s claims against QLS were subsequently dismissed with prejudice. CP 1147-1148 (Dkt. #112).

its face was defective² because it cited the cause number of a related unlawful detainer action³ rather than this action. CP 1188-1191 ((Dkt. #120) Declaration of Thierry Cassagnol at Ex. 2). That same day, McCarthy & Holthus served that same Notice of Intent to Withdraw on Melissa Huelsman, counsel for the Anup Khela in both this action and the unlawful detainer action. *See* CP 851, 858-861 (Decl. of Melissa Huelsman (Dkt. #78C) 2:8-10 & Ex. C). This Notice of Intent to Withdraw listed AMH's address as "1000 Tamiami Trail North, 2nd Floor, Sarasota FL 34275," and separately listed the same address for 10 AMH. *Id.* However, AMH, after ending its business relationship with 10 AMH, had moved on September 1, 2009, and its actual address was 551 North Cattlemen Road, Sarasota FL 34232. CP 1184, 1192-1197 ((Dkt. #120) Cassagnol Decl. ¶ 6 and Ex. 3). Despite the service of this defective Notice of Intent to Withdraw on the parties, it was *not* filed with the Court by McCarthy & Holthus in either the unlawful detainer action, to which it ostensibly applied, or in this action. Further, the Plaintiff experienced

² The caption of the Notice of Intent to Withdraw listed the cause number of the unlawful detainer action but the title of this action; the correspondence that AMH received referenced only the cause number of the unlawful detainer action. CP 1186-1187 ((Dkt.#120) Declaration of Thierry Cassagnol at Ex. 1.

³ Shortly after this action was filed, another defendant in this action, Kalen Peters, filed a related unlawful detainer action on December 3, 2008, against, inter alia, Plaintiff Anup Khela, in the same court. That unlawful detainer action, King County Superior Court cause number 08-2-41634-8, is hereinafter referred to as "the unlawful detainer action."

numerous service problems while attempting to move for default against AMH. The first time the Plaintiff moved for an order of default, on September 10, 2010, she did not serve AMH at all. CP 1060 (Dkt. #105 (11/1/10 Huelsman Decl. 1:20-26)). That motion was subsequently denied by the Court in a September 13, 2010, Minute Order because (1) there was no declaration filed in support of the motion for order of default and (2) no notice was given to AMH or 10 AMH. CP 846 (Dkt. #78A).

On September 14, 2010, the Plaintiff then apparently mailed the default pleadings to AMH and 10 AMH at the addresses in the Notice of Intent to Withdraw.⁴ CP 1060 (11/1/10 Huelsman Decl. at 1:20-26 (Dkt. #105)). However, the envelope addressed to “Asset Management Holdings, LLC” and bearing the exact address contained in the Notice of Intent to Withdraw, was returned to her office stamped “**Return to Sender; Not Deliverable as Addressed; Unable to Forward.**” CP 1081-1082 (11/1/10 Huelsman Decl. at Ex. 2 (Dkt. #105)).

The Plaintiff apparently again attempted to serve AMH by mailing copies of the default pleadings to the same address that had previously resulted in the envelope being returned as undeliverable. CP 1138-1139 (11/1/10 Decl. of Service (Dkt. # 108)). Additionally, the Plaintiff apparently mailed separate copies of the default pleadings to AMH and 10

⁴ This address was the same for both AMH entities: 1000 Tamiami Trail North, 2nd Floor, Sarasota FL, 34275. CP 1138-1139 (Dkt. #78C).

AMH at a different address, although it is unclear where the Plaintiff obtained that address.⁵ In any event, neither of those addresses were the correct address for AMH. CP 1184 ((Dkt. #120) Cassagnol Decl. at ¶ 7). Albert Lin of McCarthy & Holthus was also served with these default pleadings. CP 1138-1139 (Dkt. #108).

On November 15, 2010, the trial court entered an Order of Default stating that AMH and 10 AMH had “not appeared nor answered.” CP 1149 (11/15/10 Order of Default at 1:20 (Dkt. #113)). The Court thereafter entered a Default Judgment against AMH and 10 AMH in the amount of \$111,953.35. CP 1151-1154 (11/15/10 Default Judgment (Dkt. #114)).

B. Facts Relating to the Plaintiff’s Mortgages and 10 AMH’s Foreclosure of Its Second Position Mortgage, Which Gave Rise to the Plaintiff’s Allegations in This Action.

Plaintiff Anup Khela took out two mortgages on her property⁶. The first mortgage was from Wells Fargo, which was the senior lienholder. CP 2-14 (Complaint filed Nov. 19, 2008 (Dkt. #1) at 3:10 (hereinafter “Complaint”)). The Plaintiff then took out a second mortgage in 1998 from Land Home Financial Services, a California corporation (“Land Home”), which was the junior lienholder. CP 5 (Complaint 3:19-20). A

⁵ That address was “7820 Holiday Drive South, Sarasota, FL 34231-5346.” CP 2-14 11/1/10 Decl. of Service (Dkt. # 108).

⁶ This property is identified in the Plaintiff’s Complaint at 1:23-25 (Dkt. #1) CP 3.

Deed of Trust securing this loan was recorded in King County, which provided, in pertinent part, the following:

if any action or proceeding is commenced which materially affects Lender's [Land Home's] interest in the Property [that is the subject of this Deed of Trust], then Lender, at Lender's option, upon notice to Borrower [Anup Khela], may make such appearances, disburse such sums, including reasonable attorneys' fees, **and take such action as is necessary to protect Lender's interest.**

CP 1214 ((Dkt. #121) Declaration of Jacob Humphreys at Ex. A, ¶ 7 (emphasis added)).

Subsequent assignments of this Deed of Trust occurred, which eventually resulted in 10 AMH holding the Deed of Trust.⁷ AMH, through an agreement with 10 AMH, serviced this Deed of Trust for the benefit of 10 AMH and AMH, which included collecting and processing payments and commencing default proceedings when necessary.⁸ CP 1184 ((Dkt. #120) Cassagnol Decl. at ¶ 8).

⁷ Specifically, Land Home later assigned its interest in that Deed of Trust to FirstPlus Financial, Inc. ("FirstPlus") and that assignment was recorded in King County. CP 1216-1218 ((Dkt. #121)Humphreys Decl. Ex. B). FirstPlus later assigned its interest in that Deed of Trust to Defendant 10 Asset Management Holdings, LLC ("10 AMH") and that assignment was recorded in King County. CP 1219-1223 ((Dkt. #121)Humphreys Decl. Ex. C).

⁸ After October 31, 2008, this agreement between AMH and 10 AMH was terminated and 10 AMH was solely responsible for servicing mortgages for which 10 AMH held the Deed of Trust, including the Plaintiff's mortgage. CP 1184 ((Dkt. #120) Cassagnol Decl. at ¶ 9).

In 2008, the Plaintiff defaulted on her mortgage with Wells Fargo, causing Wells Fargo to begin default proceedings against the Plaintiff. CP 7 (Complaint 5:13-14). To avoid having 10 AMH's interest in the Plaintiff's property wiped out in the event Wells Fargo foreclosed on the Plaintiff's property, AMH, as servicer of the Deed of Trust held by 10 AMH, commenced foreclosure proceedings against the Plaintiff pursuant to Paragraph 7, *supra*, of the Deed of Trust. CP 1184 ((Dkt. #120) Cassagnol Decl. at ¶ 10). On May 8, 2008, AMH, which at that time was still servicing the loan on behalf of 10 AMH,⁹ sent the Plaintiff a letter stating that "You are in default of your mortgage with us because you are delinquent and in foreclosure status with your first mortgage company, Wells Fargo." CP 1179-1180 ((Dkt. #119) Declaration of Lynn Vadnais at Ex.1).

10 AMH then appointed QLS on July 16, 2008, as trustee to conduct a sale of the Plaintiff's property. CP 1225-1227 ((Dkt. #121) Humphreys Decl. at Ex. D). In between the appointment of QLS and the sale of the Plaintiff's property, AMH and the Plaintiff communicated regarding the possible reinstatement of the Plaintiff's loan: in an August 15, 2008, email to the Plaintiff's then-attorney, AMH stated that AMH would reinstate the Plaintiff's loan only once AMH had "confirmed that

⁹ CP 1184 ((Dkt. #120) Cassagnol Decl. 9).

all conditions [for reinstatement] have been met[.]” CP 1181-1182 ((Dkt. #119) Vadnais Decl. Ex. 2. (8/15/2008 Email)). One of those conditions for reinstatement was the recording of a loan modification agreement between Wells Fargo and the Plaintiff. CP 1184 ((Dkt. # 120) Cassagnol Decl. at ¶ 12).

However, no such loan modification had been recorded at the time that 10 AMH, through its trustee QLS, recorded its Notice of Trustee’s Sale for the Plaintiff’s property on July 16, 2008, which set the sale date for October 17, 2008. CP 1228-1229 ((Dkt. #121) Humphreys Decl. Exs. E and F).¹⁰ Thus, based on the public records, the Plaintiff’s property was sold at a trustee’s sale prior to the loan modification being recorded. CP 1232-1239 ((Dkt. #121) Humphreys Decl. at Ex. F).¹¹

Following QLS’s sale of the Plaintiff’s property, and during the pendency of this action, the Plaintiff defaulted on her modified loan with Wells Fargo: Wells Fargo sent the Plaintiff a written notice of default on September 17, 2010, and personally served the Plaintiff with this notice (or posted it on a conspicuous place on her property) on September 18, 2010. CP 1240-1245 ((Dkt. #121) Humphreys Decl. at Ex. H).

¹⁰ The Plaintiff’s loan modification agreement was not recorded until nearly two and half weeks after QLS recorded the Trustee’s Deed Upon Sale. CP 1232-1239 ((Dkt. #121) Humphreys Decl. Exs. G and F).

¹¹ Based on a review of the public records, it further appears this sale was later rescinded. CP 1209 ((Dkt. #121) Humphreys Decl. ¶ 9).

On November 8, 2010, a week before the Court entered the default judgment against AMH, Wells Fargo, through its trustee, recorded a Notice of Trustee's Sale in King County for the Plaintiff's property. *Id.* That trustee's sale was set to occur on February 4, 2011. *Id.* On February 16, 2011, a Trustee's Deed reflecting the sale of the Plaintiff's property was recorded in King County. CP 1246-1249 ((Dkt. #121) Humphreys Decl. at Ex. I).

C. AMH Acted With Due Diligence Upon Notice of the Entry of Default Against It When Plaintiff Sought Domestication of the Default Judgment in Florida.

As a result of the Plaintiff's failure to properly serve AMH with the default pleadings, AMH never received any notice that the Plaintiff was commencing default proceedings against it. CP 1184 ((Dkt. #120) Cassagnol Decl. at ¶ 13). Nor did AMH receive copies of the default pleadings, or even notification of the default proceedings, from McCarthy & Holthus, whom AMH believed was still representing it in this action for the very purpose of preventing the entry of a default judgment. CP 1184-1185 ((Dkt. #120) Cassagnol Decl. at ¶ 13, 14). In fact, the first time that AMH learned that the trial court had entered an Order of Default and Default Judgment¹² against AMH was when the Plaintiff in this action attempted to domesticate the default judgment in Sarasota County,

¹² See CP 1149-1154 (Dkt. #113 & 114, respectively).

Florida, on February 14, 2012. CP 1185 ((Dkt. #120) Cassagnol Decl. at ¶ 15).

Immediately upon learning that a default judgment had been entered against it, AMH began seeking counsel in Washington to move to set aside the default judgment that had been entered against it. CP 1186 ((Dkt. #120) Cassagnol Decl. at ¶ 16). Had AMH been aware that the Plaintiff was moving the Court for a default judgment, it would have opposed the motion. *Id.* At the same time, AMH's attorneys in Florida filed an objection to the domestication effort, which was served on the Plaintiff's counsel, stating that AMH would be seeking to set aside the default judgment that was entered in this Court. CP 1252-1254 ((Dkt. #122) Declaration of Chrystal Koch at Ex. 1). AMH retained Badgley Mullins Law Group PLLC (now Badgley Mullins Turner PLLC "BMT") on March 8, 2012. Once retained, BMT worked to gather the necessary information to bring the Motion to Set Aside Entry of Default and Vacate Default Judgment. CP 1210 ((Dkt. #121) Humphreys Decl. at ¶ 12).

IV. ARGUMENT

A. Standard on Review

An appeal from a trial court's decision on a motion for default judgment under CR 60(B) is reviewed for abuse of discretion. *Gutz v.*

Johnson, 128 Wn. App. 901, 916, 117 P.3d 390, 397-98 (2005). “[W]here the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues.” *White v. Holm*, 73 Wn. 2d 348, 351-52, 438 P.2d 581, 584 (1968) (citations omitted). A proceeding to set aside a default judgment is equitable in character and the court “should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.” *Id.* 73 Wn. 2d at 351, 438 P.2d at 584 (citations omitted).

B. The Trial Court Misapplied the Standard to Set Aside a Default Judgment.

The trial court’s discretion when asked to set aside a default judgment “concerns itself with and revolves about two primary and two secondary factors[.]” *Holm*, 73 Wn. 2d at 352, 438 P.2d at 584. “The first two are the major elements to be demonstrated by the moving party, and they, coupled with the secondary factors, vary in dispositive significance as the circumstances of the particular case dictate.” *Id.*

The trial court relied on the four-factor test from *Holm* when it denied AMH’s Motion stating “The *Holm* court lists four requirements, not giving any particular weight to any of them; but the case makes it clear

that the defendants must show the...four factors.” VRP p. 22-23, Ins. 24-2. The trial court failed to recognize that the first two factors are to be given greater weight than the secondary factors. In fact, the trial court’s analysis analyzed all four factors without giving any particular weight to any of the factors.

1. The Trial Court Did Not Give Proper Weight to AMH’s Strong Defense Against the Plaintiff’s Claims.

The first of the two primary factors that AMH must demonstrate is “that there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party[.]” *Holm*. 73 Wn. 2d at 352, 438 P.2d at 584. When the moving party demonstrates a strong or virtually conclusive defense to the opponent’s claim, the court’s inquiry into the remaining factors will be less rigorous. *Id.* However, where the moving party is able to demonstrate a prima facie defense that would “carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for” the entry of default will be subject to greater scrutiny by the court. *Id.* 73 Wn. 2d at 352-53, 438 P.2d at 584.

The default should be set aside because AMH has strong defenses to the Plaintiff’s claims. The trial court reasoned that “there’s substantial evidence that there’s at least a prima facie defense to the claim being asserted by...the plaintiff.” *Id.* at p. 23, Ins. 3-5. The court went on to say

“the defendants were asserting they had a valid contractual right to foreclose; that’s not being disputed.” *Id.* at p. 23, lns. 7-9. Indeed, AMH maintains that its defenses to the Plaintiff’s claims are strong enough to justify setting aside the default with minimal consideration of the other factors of the *Holm* test.

Of the six causes of action alleged by the Plaintiff, only causes two through five were alleged against AMH specifically.¹³ CP 10-14 (Complaint, Dkt. #1). Each of these causes of action was predicated on the underlying allegation that AMH, 10 AMH, and/or QLS had promised to cancel the foreclosure proceedings on the Plaintiff’s property in the event the Plaintiff received a loan modification from Wells Fargo. *Id.* The Plaintiff further alleged that because she eventually received a loan modification from Wells Fargo, AMH wrongfully foreclosed on the Plaintiff’s property. *Id.*

Pursuant to the Deed of Trust signed by the Plaintiff, AMH, as servicer of 10 AMH’s Deed of Trust, could take “such action as is necessary to protect Lender’s interest” in the Plaintiff’s property in the event that “any action or proceeding is commenced which materially

¹³ Specifically, these causes of action were alleged against AMH and QLS and included a tort claim for intentional infliction of emotional distress; breaches of alleged fiduciary or quasi-fiduciary duties; violation of the Consumer Protection Act; and wrongful foreclosure. CP 2-14 Complaint, Dkt. #1.

affects Lender's interest" in the Plaintiff's property. CP 1214 ((Dkt. #121) Humphreys Decl. Ex. A ¶ 7).

The Plaintiff indisputably defaulted on her loan with Wells Fargo, which, as the senior lienholder on the Plaintiff's property, thereafter commenced foreclosure proceedings. CP 1228-1231 ((Dkt. #121) Humphreys Decl. Ex. E). As a direct result of that default, which materially affected 10 AMH's interest in the Plaintiff's property by virtue of its junior lienholder status, AMH as servicer took action to protect 10 AMH's interest in the Plaintiff's property: namely, commencing foreclosure proceedings. CP 1184 ((Dkt. #120) Cassagnol Decl. at ¶ 10). Indeed, were the Plaintiff's property to be foreclosed by Wells Fargo, the junior lienholder's interest in the Plaintiff's property would also be foreclosed. CP 1184 ((Dkt. #120) Cassagnol Decl. at ¶ 09)

In short, AMH was fully justified and within its rights under the Deed of Trust in commencing foreclosure proceedings against the Plaintiff: as a result of the Plaintiff defaulting on her loan with Wells Fargo and Wells Fargo commencing foreclosure proceedings, 10 AMH would likely have lost its interest in the Plaintiff's property. *Id.* Indeed, less than ten months after the Plaintiff's loan modification with Wells Fargo was recorded, the Plaintiff again defaulted on her loan with Wells Fargo. CP 1240-1245 ((Dkt. #121) Humphreys Decl. at Ex. H). The

Plaintiff's property was subsequently sold at a trustee's sale. CP 1246-1249 ((Dkt. #121) Humphreys Decl. at Ex. I).

Thus, even if the loan modification that was recorded following AMH's trustee's sale of the Plaintiff's property would have allowed the Plaintiff to reinstate her loan with 10 AMH, that reinstatement would not have even lasted through the pendency of this case: as soon as the Plaintiff defaulted yet again on her loan with Wells Fargo, 10 AMH would have immediately re-commenced foreclosure proceedings against the Plaintiff to protect its interest in the property.¹⁴ CP 1185 ((Dkt. #120) Cassagnol Decl. 16). Moreover, as AMH was acting within its legal rights to foreclose the Plaintiff's property on 10 AMH's behalf, it would not have been liable for the emotional distress damages claimed by the Plaintiff. *See Schwarzmann v. Association of Apartment Owners of Bridgehaven*, 33 Wn. App. 397, 404, 655 P.2d 1177 (1982).

AMH has demonstrated that there is a strong defense to the Plaintiff's claims. The trial court held, at a minimum, that AMH demonstrated a prima facie defense and went on to state that the Plaintiff had not even disputed AMH's defense that is predicated on a contractual right. The trial court erred by not giving great weight to AMH's strong defense.

¹⁴ In fact, the Plaintiff defaulted on her modified loan with Wells Fargo prior to her motion for default against AMH.

2. The Superior Court Imputed the Conduct of McCarthy & Holthus to AMH.

The second primary factor that AMH must demonstrate is “that the moving party’s failure to timely appear in the action, and answer the opponent’s claim, was occasioned by mistake, inadvertence, surprise or excusable neglect.” *Holm*, 73 Wn. 2d at 352, 438 P.2d at 584. Washington Courts have held that it is improper to impute the fault of a defendant’s representative to the defendant when that fault results in the entry of a default judgment. *Id.* 73 Wn. 2d at 354-55, 438 P.2d at 585-86 (The court was unwilling to impute the fault of the insurer to the defendant. The default judgment was vacated.); see also *Holm*, 73 Wn. 2d at 355, 438 P.2d at 586 citing *Reitmeir v. Siegmund*, 13 Wn. 624, 43 P. 878 (1896) (Attorney’s mistake led to default judgment which was vacated by trial court. In sustaining the vacation of the default judgment the court stated “there was no abuse of discretion in granting the order [to set aside a default judgment], but that it would have been a great abuse of such discretion to have denied it.”); *Kain v. Sylvester*, 62 Wn. 151, 113 P. 573 (1911) (default judgment set aside as a result of defendant’s good faith belief that he had employed an attorney to represent him when he, in fact, had not); *Leavitt v. DeYoung*, 43 Wn. 2d 701, 263 P.2d 592 (1953)

(default judgment set aside as a result of misunderstanding and inadvertence by insurer's attorney).

As a result of McCarthy & Holthus's failure to properly file its Notice of Withdrawal, AMH never received notice that the Plaintiff was commencing default proceedings from either the Plaintiff or McCarthy & Holthus. The superior court stated that, "To the extent there was a mistake made or there was negligence, in the Court's view it was on behalf of defense counsel at McCarthy & Holthus." VRP p. 23, lns. 15-18. The court reasoned that:

The letter of withdrawal should not have left counsel confused to the extent that total inaction resulted. Counsel for the defendants at that point either were negligent in not filing the notice of withdrawal, or had a change of heart, but nonetheless continued to receive notices. And the next notice they received was the notice of the default proceedings. At that point, legally, they were still of counsel for the defendants. They had a legal and ethical obligation, since they had never filed their notice of withdrawal, to continue to represent the defendant AMH.

Id. at p. 24-25, lns. 16-1.

However, after highlighting the negligence of McCarthy & Holthus the superior court went on to hold that

The defendant, AMH, having received this letter of withdrawal, clearly did not satisfy,

in the Court's view, the second factor in *Holm*, except to the extent that their law firm, the law firm which was still representing them legally, failed in their responsibilities to their own client, by not relaying the notice of the default motion to them.

Id. p. 25, lns. 12-18.

The trial court spends the better part of two pages of the transcript excoriating the negligence of McCarthy & Holthus and then imputes this negligence onto AMH. In accord with the relevant case law, AMH should not be punished for the negligence of McCarthy & Holthus. Further, the trial court erred by not giving greater weight to McCarthy & Holthus's negligence.

3. The Trial Court Confused AMH's Diligence After Notice of the Default Judgment with Its Failure to Immediately Seek New Counsel.

The third factor (and first secondary factor) that AMH must demonstrate is that it "acted with due diligence after notice of the entry of the default judgment." *Holm*, 73 Wn. 2d at 352, 438 P.2d at 584.

AMH's first notice of the default judgment was when the Plaintiff attempted to domesticate the default judgment in Sarasota County, Florida, on February 14, 2012. It is unclear from the record why the Plaintiff waited for over a year to execute the judgment but the Plaintiff's

lack of diligence in executing the judgment should not weigh against AMH. For all AMH knew, the lawsuit was sitting dormant.

The trial court reasoned that because the default judgment was on file in this case that AMH had “*de facto* notice” of the default judgment. VRP p. 25-26, lns. 23-24, 1-2. However, AMH did not have actual notice of the default judgment until the attempted domestication of the judgment. Upon receiving actual notice, AMH opposed the domestication and retained BMT to move to set aside the default. The trial court stated that “[c]urrent counsel (BMT) certainly has proceeded with due diligence, after being retained, to move to set aside this default judgment.” *Id.* p. 26, lns. 8-10.

Upon receiving actual notice of the default judgment, AMH’s due diligence in working to set aside the default judgment satisfies the third factor of the *Holm* test. The trial court erred by holding AMH lacked diligence during the year that Plaintiff did not execute the judgment it had obtained. The fact that the Plaintiff sat on this judgment for so long should not prejudice AMH, whom the trial court recognized, moved with due diligence once it received the notice it was entitled to. Further, the trial court erred in giving this factor equal weight to the two primary factors.

4. The Superior Court Held That the Plaintiff Having to Defend this Matter on the Merits Was “Substantial Hardship.”

The fourth factor (and last secondary factor) that AMH must demonstrate is that “no substantial hardship will result to the opposing party[]” if the default judgment is set aside. *Holm*, 73 Wn. 2d at 352, 438 P.2d at 584. “The possibility of a trial is an **insufficient basis** for the court to find substantial hardship on the non-moving party.” *Gutz*, 128 Wn. App. at 920, 117 P.3d at 400 (emphasis added). “If the law were otherwise, a judgment would never be set aside, for that *always* generates the prospect of trial.” *Pfaff v. State Farm Mutual Auto. Ins. Co.*, 103 Wn. App. 829, 836, 14 P.3d 837, 841 (2000) (emphasis in original). Washington’s policy “prefers parties resolve disputes on the merits, as opposed to default proceedings.” *Gutz*, 128 Wn. App. at 920-21, 117 P.3d at 400.

In the present case, the trial court held that the plaintiff’s “substantial hardship is the loss of the judgment already awarded[.]” VRP p. 26, lns. 20-21. The trial court noted that if the “default judgment is set aside, the plaintiff certainly will endure the hardship of additional attorney’s fees and, potentially... a verdict in favor of the defendant.” *Id.* p. 26, lns. 15-20.

In essence, the trial court held that plaintiff’s “substantial hardship” is a trial on the merits with the chance of losing that trial. This is

erroneous reasoning because the first primary factor of the *Holm* test is the strength of the defendant's defense. A strong showing of a defense increases the likelihood of prevailing on the merits and it is illogical to deem a strong showing of the first primary factor as a reason not to overturn a default judgment. What is more, Washington law clearly states that having to try a case on the merits is not a "substantial hardship." See *Gutz*, 128 Wn. App. at 920, 117 P.3d at 400. Because the plaintiff has made no showing of actual "substantial hardship" she should have to prove her claims on the merits. Further, the trial court erred in giving this factor equal weight to the two primary factors.

D. The Trial Court Failed to Consider AMH's Failure to Receive Notice Pursuant CR 55.

Under CR 55(a)(3), once a party has appeared, it is entitled to notice of a motion for default before the entry of a default order. *Gutz*, 128 Wn. App. at 912, 117 P.3d at 396. As a result, if a defendant has appeared but has "not [been] given proper notice prior to the entry of the order of default, the defendant is entitled to vacation of the default judgment as a matter of right." *Id.* (internal quotations and citations omitted).

As stated above, AMH had appeared in this matter but did not receive notice of the default judgment until the Plaintiff's sought to domesticate the judgment in Florida on February 14, 2012, more than a

tried, unsuccessfully, to mail the notice to AMH. The judgment was entered against AMH without it ever receiving notice.

If this Court does not find that AMH satisfied the four factors of the *Holm* test the default judgment should still be vacated because AMH never received proper notice prior to the entry of the order of default.

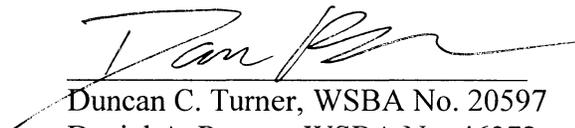
V. CONCLUSION

For all the foregoing reasons, AMH respectfully requests that this Court reverse the trial court's determination that AMH was not entitled to have the default judgment set aside and to try this case on its merits.

Dated this ___ day of April, 2015.

Respectfully submitted,

BADGLEY MULLINS TURNER PLLC


Duncan C. Turner, WSBA No. 20597
Daniel A. Rogers, WSBA No. 46372
Attorneys for Appellant