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No. 64828-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

COOPER SQUARE OWNERS ASSOCIATION

Appellant,

v.

THANH TU GIANG and JOHN DOE GIANG, wife and
husband, and their marital community; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware
corporation; and JPMORGAN CHASE BANK, N.A.,

Respondents

APPELLANT'S OPENING BRIEF

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 1. Respondent MERS did not provide substantial evidence of a meritorious defense that its purported mortgage lien is senior to the Appellant Association's lien.

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I. INTRODUCTION

Appellant, Cooper Square Owners Association ("Association") filed a lawsuit to foreclose its statutory lien for unpaid condominium assessments. The Association's lien has statutory priority over mortgage liens. Therefore, the respondent, Mortgage Electronic Registration Systems, Inc. ("MERS"), was a named party to the lawsuit because it purported to have a mortgage lien against the condominium unit being foreclosed. As with any junior lienholder, MERS had the ability to protect its mortgage lien by paying off the Association's lien (and getting dismissed from the lawsuit).

MERS was served with process but did not appear or file an answer prior to a default order being entered. The Association obtained a default judgment and foreclosure decree (hereinafter, "judgment") declaring the Association's lien to be senior to MERS's mortgage lien.

MERS filed a motion to vacate the judgment, which was granted. The Association filed a motion to reconsider, which was denied.

The Association filed this appeal seeking to have the trial court's order vacating the judgment reversed and to have the judgment affirmed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it granted MERS's motion to set aside the Association's Judgment. CP 212-213.

2. The trial court erred when it denied the Association's motion to reconsider. CP 218 - 219.

B. Issues Pertaining to Assignments of Error

1. Whether MERS failed to show substantial evidence of a meritorious defense to the Association's claim that its lien for unpaid condominium assessments is senior to MERS's mortgage lien. (Assignments of Error 1 and 2.)

2. Whether MERS failed to demonstrate mistake, surprise or excusable neglect as the

reason for its failure to timely appear and answer the complaint. (Assignments of Error 1 and 2.)

III. STATEMENT OF THE CASE

The Association is a non-profit condominium association that filed a lawsuit to foreclose its lien for unpaid homeowner assessments against the unit in question on July 1, 2009. CP 3-9. MERS was made a party to the lawsuit because, according to county land records, MERS held the beneficial interest in a deed of trust encumbering the condominium unit. CP 163, 196-97. MERS was served with the summons and complaint in Delaware on July 8, 2009. CP 11.

As revealed in its motion to vacate papers, as early as 47 days later, on August 24, 2009, MERS's own counsel was aware of the summons and complaint being served. CP 98. However, without any explanation whatsoever, MERS did not appear or file an answer to the complaint within the 60 days as allowed by RCW 4.28.180. As a result, a

default order was entered against MERS on September 22, 2009. CP 20-21.

Not until October 23, 2009, 107 days after being served with the summons and complaint, did MERS finally enter an appearance and file an answer. CP 100-102. Three days after that, on October 30, 2009, the court entered the default judgment foreclosing the Association's lien. CP 65-69.

On November 13, 2009, MERS obtained an order to show cause as to why the judgment should not be vacated. CP 119-120. On December 7, 2009, an order vacating the judgment as to MERS was entered. CP 212-213. The order did not contain any written findings or conclusions that would support the ruling.¹ Id.

The Association filed a motion to reconsider on December 15, 2009. CP 214-17. The motion also requested that the court enter written findings to clarify the issues for a potential appeal. Id.

¹ The order states that the court heard oral argument of counsel. However, the court granted the order prior to the scheduled hearing and without hearing any oral argument. CP 212-13.

The court did not request a response from MERS and denied the motion without a hearing. CP 218-19. The court did not enter written findings or conclusions as requested. Id. The Association now appeals the order vacating the judgment, requesting that the trial court's decision be reversed and the default judgment affirmed.

IV. SUMMARY OF THE ARGUMENT

MERS did not provide sufficient evidence to satisfy its burden to have the judgment vacated. Case law and court rules require that MERS show at the very least (1) substantial evidence of a prima facie meritorious defense and (2) mistake, surprise or excusable neglect.

As to the first point, MERS cannot show a meritorious defense to the Association's claim because state law expressly provides that the Association's lien is senior.

Similarly, MERS did not provide any evidence that would constitute mistake, surprise or excusable neglect as to why it took 107 days after being served with process to enter an

appearance and answer the complaint. In fact, MERS did not provide any reason at all for not appearing and answering.

V. ARGUMENT

A. The trial court erred when it granted the motion to set aside the Association's judgment.

The standard of review for vacation of default judgments is abuse of discretion. Showalter v. Wild Oats, 124 Wn. App. 506, 510, 101 P.3d 867 (2004).

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, excusable neglect" CR 60(b)(1).

Courts apply a four-part test to determine if a default judgment should be vacated: (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party; (2) 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; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 587 (1968). The first two elements of the White test are the primary factors to examine. Id., Johnson v. Cash Store, 116 Wn. App. 833, 841-42, 68 P.3d 1099 (2003). MERS failed to establish either of the two primary factors.

1. MERS did not provide substantial evidence of a meritorious defense that its purported mortgage lien was senior to the Association's lien.

In its motion to vacate, MERS merely provided a conclusory statement that its mortgage lien was senior "pursuant to Washington law." CP 73. It provided no support for this statement.

In its reply brief, MERS argued that its mortgage lien was recorded before the Association's lien for unpaid assessments and is

therefore senior. CP 169. This was the sum total of the "substantial evidence" that MERS provided to show it had a meritorious defense.

To be sure, under Washington's recording statute, RCW 65.08.070, liens ordinarily take precedence in order of time. First in time being the first in right. See Bank of America, N.A. v. Prestance Corp., 160 Wn.2d 560, 569-570, 160 P.3d 17 (2007).

However, this is not the case with condominium assessment liens. The priority of those liens are governed by the Washington Condominium Act (RCW 64.34, et seq.), which provides in pertinent part:

. . . the lien [for unpaid condominium assessments] shall also be prior to the mortgages . . . to the extent of assessments for common expenses, exclusive of any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW 64.34.360(1) which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure . . ."

RCW 64.34.364(3). In other words, the Association's lien is prior (i.e., senior) to

mortgages in an amount equal to six months of condominium assessments for common expenses based on the Association's periodic budget.

Furthermore, the Official Comments to the Act (published by the Washington Condominium Statutory Revision Task Force), support the proposition that the Association's lien is in first position. The Official Comments provide in relevant part: "As a practical matter, mortgage lenders will most likely pay the assessments demanded by the association which are prior to its mortgage rather than having the association foreclose on the unit and eliminate the lender's mortgage lien." (Emphasis added.) Appendix.

The plain language of the Act and the Official Comments refute MERS's argument that it had a meritorious defense solely because its lien was recorded first. As a result, the trial court erred in setting aside the judgment.

2. MERS failed to offer any evidence that would amount to mistake, inadvertence or excusable neglect.

MERS argues its failure to appear was due to due to mistake, inadvertence, surprise or excusable neglect. However, the only explanation

offered by MERS was that "MERS appeared on October 23, 2009, a day after undersigned counsel was retained." CP 75. MERS devoted the rest of its show cause motion to merely citing several cases in which courts affirmed a trial court's decision to vacate a default judgment. CP 74-75. But citing cases without providing supporting evidence proves nothing.

None of this explains what MERS was doing during the 106 days between when it was served with process on the one hand and retained "undersigned counsel" on the other. It also does not address why MERS did not enter an appearance or answer after MERS's own counsel became aware of the lawsuit on August 24, 2009 (CP 98), well before the deadline to answer the complaint had expired.

Without any explanation for MERS's inaction, one is left to presume there was some sort of error or breakdown in MERS's internal procedures that caused it to take 106 days to hire outside counsel. However, as this Court has previously

ruled, breakdowns in corporate office management or internal procedures are not a basis for excusable neglect. TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 165 P.3d 1271 (2007).

There is simply no factual basis in the record that would support a conclusion that MERS's failure to appear was occasioned by mistake, inadvertence, surprise or excusable neglect. Therefore, the judgment should not have been vacated.

B. The Association is entitled to recover attorney fees and costs on appeal.

The Association is entitled to recover its fees and costs pursuant to both statute and its recorded condominium Declaration. Both RCW 64.34.364(14) and Declaration §16.9, Recovery of Attorneys' Fees and Costs, provides:

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

prevails on appeal and in the enforcement of a judgment.

Furthermore, RCW 64.34.455 provides:

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

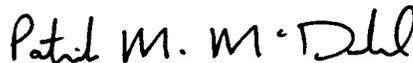
Therefore, the Association respectfully requests that, in the event it prevails on appeal, that it be granted leave to move for its attorney fees and costs.

VI. CONCLUSION

The Association respectfully requests that the trial court's order vacating the judgment be reversed and that the judgment be affirmed.

Dated this 8th day of April, 2010

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APPENDIX

reallocated among the units of a condominium by amendment to the declaration. These provisions include RCW 64.34.060 (Condemnation), RCW 64.34.220(5) (expiration of certain leases), RCW 64.34.236 (Exercise of Development Rights) and RCW 64.34.248(2) (Subdivision of Units).

RCW 64.34.364. LIEN FOR ASSESSMENTS.

1. Subsection (1) provides that the association has a lien on a unit for unpaid assessments from the time that the assessment is due.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (2) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and mortgages recorded before the date the assessment became delinquent. However, as to prior mortgages, subsection (3) provides that the association's lien does have a limited priority for assessments based on the periodic budget. (See Comment 3).

3. The association's priority under subsection (3) is usually for a sum equal to the assessments which would normally have come due in the six month prior to the foreclosure of either a mortgage or the lien for assessments. The period dates back from the time of the foreclosure sale, or the recordation of the declaration of forfeiture. A significant departure from existing practice, the priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the assessments demanded by the association which are prior to its mortgage rather than having the association foreclose on the unit and eliminate the lender's mortgage lien.

4. The priority for the assessment lien may be reduced under subsection (4) by up to three months of assessments where a mortgagee has either filed a notice with the secretary of the association making it an "eligible mortgagee" or has made a written request to the association for a notice of delinquencies, and the assessment lien priority relates to a period during which the association was under an obligation to give the mortgagee notice of the delinquencies but failed to do so. In addition, if a mortgage lender forecloses its lien, it will take subject to the association's lien for up to six months' assessments. If the mortgage lender wishes, an impound for assessments can be required.

5. Under subsection (6) the lien priority is automatically waived by the association, however, by electing to foreclose its lien nonjudicially pursuant to subsection (9).

6. Although RCW 64.34.364 is automatically applicable to condominiums created under RCW 64.32 by virtue of RCW 64.34.010(1), it is only applicable with respect to events and circumstances occurring after the effective date of the act. Thus an assessment lien would not have any priority over a mortgage recorded prior to the effective date of this Act. In addition, because RCW 64.34.364 does not invalidate or supersede existing, inconsistent provisions of the governing documents of these pre-Act condominiums, an association would have to amend its declaration to change any language giving mortgages absolute priority over the lien for assessments.

7. A lien for assessments is not subject to the homestead exemption of RCW 6.13 and an association will no longer need to give the notice regarding the effect of foreclosure which is required by that chapter in order to avoid the homestead exemption.

8. Subsection (7) makes clear that the only document which needs to be recorded to give record notice of and to perfect the association's lien is the declaration. A notice of claim of lien need not be recorded by an association in order to enforce its lien or to perfect its priority vis-a-vis other liens. Recording of such a notice is permissive and does not satisfy the requirement of actual notice to a mortgagee entitled to notice of their mortgagor's delinquency.

9. Subsection (8) supersedes the six year statute of limitations for an action upon a liability arising out of a written agreement and imposes a three year statute of limitations on a proceeding to foreclose the association's lien for assessments or to collect on the personal liability of any person to pay assessments.

10. In addition to the judicial foreclosure of assessment liens in the manner of a mortgage which has been available to associations under RCW 64.32, the Act in subsection (9) adds the ability for an association to foreclose its assessment lien nonjudicially under RCW 61.24. In order to avail itself of this procedure, the declaration, which serves the purpose of the deed of trust, must contain the same elements found in a deed of trust, that is, (a) a grant of the condominium in trust to a trustee qualified under RCW 61.24.010 to secure the obligations of the unit owners to the association for the payment of assessments, (b) a power of sale, (c) a provision that the units are not used principally for agricultural or farming purposes, and (d) a provision that the power of sale is operative in the case of a default in the obligation to pay assessments.

11. Under subsection (10) the right to the appointment of a receiver to rent out a unit is automatically available to an association once a foreclosure has been commenced even if the declaration does not expressly provide for this remedy. However, the remedy is only available with respect to a unit which is not occupied by its owner.

12. Subsections (12) and (16) make clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

13. In view of the association's powers to enforce its lien for unpaid assessments, subsection (15) provides unit owners with a method to determine the amount presently due and owing. A unit owner may obtain a statement of any unpaid assessment, including fines and other charges enforceable as assessments under subsection (1), currently levied against the owner's unit. The statement is binding on the association, the board of directors, and every unit owner in any subsequent action to collect such unpaid assessments.

14. Units may be part of a condominium and of a larger real estate regime. For example, a large real estate development may consist of a larger planned community which contains detached single family dwellings and town houses which are not part of any condominium and a high-rise building which is organized as a condominium within the planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (6) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or become delinquent.

15. One of the remedies for collection of delinquent assessments available to many associations created under RCW 64.32 is the power to terminate utilities to a unit on ten days notice to an owner. Although the Act does not grant this power to associations created after its effective date, RCW 64.34.010(1) makes it

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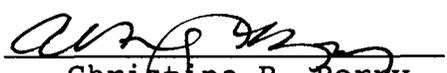
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DECLARATION OF SERVICE

Christina R. Berry, under penalty of perjury under the laws of the State of Washington, declares as follows:

That true and correct copies of Apellant's Opening Brief and this Declaration of Service were caused to be delivered to all parties shown on the attached list via legal messenger on the date signed below.

Signed at Mercer Island, Washington on APRIL 9TH, 2010.


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