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No. 64828-4-I
DIVISION ONE, COURT OF APPEALS
OF THE STATE OF WASHINGTON

COOPER SQUARE OWNERS ASSOCIATION,

Plaintiff/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
JP MORGAN CHASE BANK, N.A.,

Defendants/Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Theresa Doyle)

RESPONDENT MERS, INC.'S ANSWERING BRIEF

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I. INTRODUCTION

Appellant Cooper Square Owners Association (“the Association”) filed this suit against bankrupt condominium unit owners and the Respondent, Mortgage Electronic Registration Systems, Inc. (“MERS”), the nominee beneficiary in the Deed of Trust on the condominium unit, to foreclose on a statutory lien for unpaid condominium assessments. MERS did not appear and answer within the sixty days provided in RCW 4.28.180, and the Association obtained an order of default.

A few weeks after this order of default, MERS appeared and answered the Association’s complaint. A few days following this appearance and answer, and without notice to MERS, the Association moved for and obtained a default judgment and decree of foreclosure. Upon MERS’ motion, the trial court ordered the default judgment and decree vacated. The trial court denied the Association’s motion for reconsideration.

The Association appeals, hoping to obtain payment of the purported unpaid assessments through a tactical default against MERS, the nominee for a superior lienholder. Preferring to resolve this matter on the merits, the trial court did not abuse its discretion in vacating the default. Its decision should be affirmed and this matter should be remanded for trial.

II. COUNTERSTATEMENT OF ISSUES

A. Did the trial court act within its discretion when it granted MERS' motion to set aside the Association's default judgment? CP 212-13.

1. Whether MERS presented sufficient evidence and arguments questioning the Association's authority and method of foreclosing its purported lien so as to create a prima facie meritorious defense that would justify resolving case on its merits.

2. Whether MERS presented sufficient evidence of mistake, inadvertence, or excusable neglect that, when weighed along with the compelling meritorious defense, the diligence of counsel in responding to the default proceedings, and the lack of prejudice to the Association, it was reasonable for the trial court to vacate the default judgment.

3. Whether the Association will be prejudiced by having to defend its purported lien on its merits.

B. Did the trial court act within its discretion when it denied the Association's motion to reconsider? CP 218-19.

III. COUNTERSTATEMENT OF THE CASE

Sometime before June, 2009, Cooper Square condominium unit owners Thang Tu Giang and Hao Chia Ma ("Unit Owners") declared bankruptcy. CP 8-9. Respondent MERS was identified as the nominee

beneficiary in the Deed of Trust on their condominium unit, which secured their residential mortgage loan. CP 197. The Association received relief from the automatic bankruptcy stay and was allowed to sue for unpaid condominium assessments. CP 8-9. On July 1, 2009, the Association filed suit against the Unit Owners and MERS, to foreclose on a statutory lien for the unpaid assessments. CP 1-10.

The Association served MERS with a summons and complaint at its national headquarters in Delaware on July 8, 2009. CP 11. MERS appeared the day after the summons and complaint were provided to local counsel for MERS' member BAC Home Loans Servicing, L.P., and answered the complaint four days later. CP 174. In the meantime, the Association had obtained an order of default about two-weeks after the 60-day deadline to answer. CP 12-19. Three days after MERS filed its answer, the Association, without notice to MERS, obtained a default judgment and foreclosure decree. CP 30-37, 65-69.

The trial court vacated this default judgment and decree on December 7, 2009, concluding that MERS had demonstrated a meritorious defense, irregularities in the service of process, and a lack of prejudice to the Association. CP 212-13. The trial court properly denied the Association's motion for reconsideration. CP 218-19. The Association appeals, hoping to obtain payment of the purported unpaid assessments

through a tactical default against the nominee for a superior lienholder. For the above reasons, the decision of the trial court to vacate the default judgment against MERS should be affirmed and this matter should be remanded for trial.

IV. ARGUMENT

A. **The Trial Court Acted Within Its Discretion When It Granted the Motion to Set Aside the Default Judgment.**¹

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). “A trial court abuses its discretion by issuing a manifestly unreasonable or untenable decision.” Id. On the principle that the trial court should exercise its discretion in the preservation of substantial rights, an “[a]buse of discretion is less likely to be found if the default judgment is set aside.” Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 582, 599 P.2d 1289 (1979); see also White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

Default judgments are disfavored in Washington based on an overriding policy in favor of parties resolving their disputes on the merits. Showalter, 124 Wn. App. at 510; see also Griggs, 92 Wn.2d at 581. A

¹ The Association identifies the trial court’s denial of its motion to reconsider as an Assignment of Error. Because the analysis of an appeal of this denial is substantially the same as the analysis of the appeal of the vacation of the default judgment, the analysis will not be repeated here.

default judgment is one of the most drastic actions a court can take to punish a party for failing to meet deadlines. Id.; see also Lee v. Western Processing Co., 35 Wn. App. 466, 468, 667 P.2d 638 (1983). “Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted.” TMT Bear Creek Shopping Center, Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 200, 165 P.3d 1271 (2007) (citing Johnson v. Cash Store, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003)). Thus, in furtherance of the policy preferring that matters are decided on the legal merits, a trial court has the discretion to reverse hurried defaults and penalize continuing delays.

When considering whether to vacate a default judgment, courts apply four factors first articulated in White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). These factors are:

- (1) That there is substantial evidence extant to support, as least prima facie, a 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.

Showalter, 140 Wn. App. at 201. The first two factors are primary, and the third and fourth are secondary. Id. These factors are derived from CR 60(b), the basis of a motion to vacate.

A trial court's weighing of these factors and its resulting decision must be upheld on review unless they are manifestly unreasonable or untenable. Here, MERS presented evidence of a meritorious defense, reasons for failure to timely appear, and due diligence after notice of entry of default judgment, and the Association claimed no resulting hardship. The trial court's decision was not manifestly unreasonable nor untenable, thus it was acting within its discretion and should be upheld.

1. MERS proffered substantial evidence of a prima facie meritorious defense.

A defendant satisfies its burden of demonstrating the existence of a prima facie defense if it produces evidence which, if later believed by the trier of fact, would constitute a defense to the claims presented. TMT Bear Creek, 140 Wn. App. at 202. The court must take the evidence offered and its reasonable inferences in the light most favorable to the movant. Id. Here, MERS moved to vacate the default judgment on the grounds that Washington law does not give the Association the broad rights that it claims in its complaint. CP 73.

Specifically, to counter the Association's claim that it has a lien on the condominium unit created pursuant to RCW 64.32 and/or RCW 64.34 that is senior to the mortgage lien, CP 5, MERS argued that under the facts of this case and Washington law, including but not limited to RCW 64.32.200(2)(b) and/or RCW 64.34.364, the mortgage lien is senior

to the Association's lien. CP 73, 167-69. Therefore, MERS argued, the Association should not be allowed to eliminate MERS' substantially greater mortgage lien through a default judgment, especially when MERS had already appeared and answered. Id.

MERS identified the statutory source of the Association's lien as RCW 64.34.364(1), which places it generally junior to mortgages recorded before the date of the assessment.² CP 168. The only exception is that the Association takes a defined, limited priority only for "assessments for common expenses, excluding any amounts for capital improvements . . . which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by . . . the association[.]" RCW 64.34.364(3). CP 168. Thus, the Association's lien is not broadly senior to the mortgage, as the Association claims. Although the Official Comments to the Condominium Act recognizes the limited priority of condominium assessment liens, it also recognizes the "obvious necessity for protecting the priority of the security interests of mortgage lenders." CP 165. The Association's claims and subsequent default judgment eviscerate the security interests of the

² RCW 64.34.364(1) provides in relevant part: "A lien under this section shall be prior to all other liens and encumbrances on a unit except: . . . (b) a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent."

mortgage lender in this case, and are thus not in accordance with the law. CP 73, 167-69.

In moving to vacate the default judgment, MERS argued and demonstrated that the timing and amounts of assessments the Association claimed are critical to determining the rights of each party. CP 73, 167-69. MERS also exposed the total failure of the Association to provide a clear factual basis for the assessments under the six-month standard of RCW 64.34.364(3). CP 168-69. The only evidence proffered by the Association is a simple spreadsheet, which does not reference any contractual basis for the assessment amount, does not account for the statutory six-month standard, and may exceed any authorized amount. CP 40, 44. As the trial court found, this is a compelling meritorious defense to the Association's claims.

The Association is trying to use the default judgment process to achieve broad lien superiority to the great detriment of MERS' legally-protected interest. It is attempting to avoid the statutory limits on its lien priority in an effort to force MERS into paying an unsubstantiated amount of debt that MERS was never obligated to pay in the first place. This is the defense that MERS presented in its motion to vacate the default judgment; it is not only meritorious, it is compelling. The trial court

properly determined this and thus acted within its discretion in vacating the default.

2. MERS proffered sufficient evidence of mistake, inadvertence, or excusable neglect sufficient to justify vacation of the default judgment.

Willful disobedience of judicial deadlines or mere inattention or neglect is not grounds to set aside a default judgment. Larson v. Zabroski, 21 Wn.2d 572, 575, 152 P.2d 154 (1944). Willful intent to ignore a lawsuit is also cited as a reason to not vacate a default judgment. Showalter, 124 Wn. App. at 514. Less blameworthy conduct, however, does satisfy CR 60(b)(1)'s definition of "mistakes, inadvertence, surprise, [and] excusable neglect[.]"

The Association relies exclusively on the holding of TMT Bear Creek to support its theory that MERS' conduct is legally inexcusable and default judgment is required as a matter of law. That case repeats the principle that "if a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure is not excusable." TMT Bear Creek, 140 Wn. App. at 212-13. In TMT Bear Creek, the defendant's legal assistants responsible for calendaring complaints failed to schedule the deadline for answering. 140 Wn. App. at 213. Under the principle above, this was inexcusable and a default judgment was not inappropriate. Id.

The facts of the matter at bar are absolutely distinguishable. What happened between July and October of 2009 regarding MERS and the pleadings in this matter was not a situation of breakdown of internal office procedure. CP 166-67, 177-95. MERS explained the situation in its moving papers, Id., providing satisfactory evidence of mistake, inadvertence, or excusable neglect. In August of 2009, the same summons and complaint that had been served on MERS the previous month were served on another entity along with a Temporary Restraining Order (“TRO”) from the United States District Court for the Northern District of California. Id. This TRO and the accompanying documents were forwarded to a MERS member, BAC Home Loans Servicing, who had also been forwarded the summons and complaint served in July, 2009 in Delaware. CP 166-67. This created considerable confusion. CP 167. When weighed along with the compelling meritorious defense discussed above, the diligence of local counsel once the default process began, and the lack of prejudice to the Association by vacating the default, the trial court’s determination that this confusion qualified as mistake and/or excusable neglect so as to set aside the default was not manifestly unreasonable.

Contrary to the Association’s baseless claim that MERS provided no explanation of what took place in the time between service of the

summons and complaint and the appearance, in its moving papers MERS offered an explanation of the circumstances surrounding the receipt of the complaint at MERS' national headquarters and the timely response of local counsel upon assignment of the matter. CP 166-67, 177-95. These circumstances do not demonstrate any willful intent to ignore the lawsuit or the Court's deadlines. Appellant's brief takes great pains to portray the August 24, 2009 letter as demonstrating that MERS' counsel was aware of the pending lawsuit. A close look at that letter reveals that this was not the case. Rather, it reveals the potential for the great confusion that followed, as explained above. The trial court did not abuse its discretion in finding the vacation factors satisfied and setting aside the default judgment.

The diligence of local counsel in responding to the default proceedings must be emphasized here, as the third factor under the White v. Holm test requires. Although diligence of counsel is a secondary factor, "[t]hese factors are interdependent; thus, the requisite proof that needs to be shown on only one factor depends on the degree of proof made on each of the other factors." Norton v. Brown, 99 Wn. App. 118, 124, 992 P.2d 1019, rev. denied, 142 Wn.2d 1004, 11 P.3d 826 (2000). The court in Norton cites the promptness of defense counsel in moving to vacate the default as one of the main reasons that the motion to vacate should have been granted. Norton, 99 Wn. App. at 126.

Local counsel appeared in this matter on October 23, 2009, one day after they were retained by MERS' member BAC Home Loans Servicing, Inc. CP 83. MERS filed its answer to the Association's complaint on October 27. CP 25-29. Three days later, the Association moved for and obtained default judgment, without telling the court that MERS had indeed appeared and answered the complaint – there was not a single mention of MERS' appearance and answer in its moving papers. CP 30-69. Within two weeks, MERS moved to set aside the default judgment, CP 70-81, certainly well within the letter and spirit of CR 60(b)'s "reasonable time . . . but not more than 1 year after the judgment" timeframe. The Norton court would likely acknowledge with approval the facts that, in this case, MERS appeared and answered before the court entered the default judgment and then promptly responded to it. The third White v. Holm factor, regarding diligence of counsel, is unquestionably satisfied here in MERS' favor.

3. The Association will suffer no prejudice if it is required to defend its claim on the merits.

The final White v. Holm factor – whether the opposing party will suffer substantial hardship due to setting aside the default judgment – is also satisfied in favor of MERS. The Association has not pled or argued anywhere in the record that it will suffer hardship if it is required to defend its claim on the merits. It has not argued reliance on the default judgment

or made any claim as to destruction of evidence, or any other facts to support a claim of prejudice. In light of the overriding policy favoring the resolution of claims on their merits rather than default, the Association should suffer no substantial hardship from the trial court's decision to vacate the default judgment. All that MERS is asking is that the Association prove its case on the merits, like any other civil litigant.

B. MERS Is Entitled to Attorneys Fees and Costs on Appeal.

1. RCW 63.34.455 authorizes attorneys fees to prevailing parties in actions under the Condominium Act.

RCW 63.34.455 governs fee awards for actions under the Condominium Act. Eagle Point Condominium Owners Ass'n v. Coy, 102 Wn. App 697, 715, 9 P.3d 898 (2000). The statute provides that:

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.

RCW 63.34.455. Such fees may be awarded on appeal as well. Eagle Point, 102 Wn. App. at 715; see also RAP 18.1(a). Once MERS prevails in this appeal, MERS requests that it be awarded compensation for fees and costs associated with the appeal.

2. The Condominium Declaration provisions regarding attorneys fees are inapplicable to this appeal.

The Association cites its recorded Condominium Declaration as an authoritative source for attorneys fees. This is altogether inapplicable vis-à-vis MERS because MERS is not a party to that contract and the relationship between MERS and the Association is not governed by it. The Condominium Declaration is properly disregarded as a authority on attorneys fees in this matter.

V. CONCLUSION

For the reasons above, Respondent MERS, Inc. respectfully requests that the trial court's order vacating the default judgment be affirmed and the case remanded for trial.

RESPECTFULLY SUBMITTED this 16th day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2010, I caused to be served a copy of the foregoing **RESPONDENT MERS, INC.'S ANSWERING BRIEF** on the following person(s) in the manner indicated below at the following address(es):

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