

No. 65857-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EMERALD GARDENS CONDOMINIUM OWNERS ASSOCIATION

Appellant,

v.

U.S. BANK, N.A., AS TRUSTEE FOR THE REGISTERED
HOLDERS OF MASTR BACKED SECURITIES TRUST, 2006-
AM1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES
2006-AMI

Respondent

APPELLANT'S OPENING BRIEF

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Case of Emerald Gardens Condominium Owners Association v. U.S. Bank, N.A., et al.

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I. INTRODUCTION

This is an appeal from a trial court's ruling to set aside a default order and to vacate a quiet title decree.

Three years ago, Appellant Emerald Gardens Condominium Owners Association ("Association") judicially foreclosed its lien for unpaid condominium assessments on a unit in the Emerald Gardens Condominium (the "property"). Respondent U.S. Bank, N.A., as Trustee for the Registered Holders of Mastr Backed Securities trust, 2006-AM1, Mortgage Pass-Through Certificates, Series 2006-AM1's ("U.S. Bank") predecessor in interest was named as a party. Neither did U.S. Bank nor its predecessor in interest appear or defend their interest in the property. A foreclosure decree was entered on October 12, 2007. At the February 6, 2009 sheriff's sale, the Association was the only bidder and is now the owner of the property.

The Association filed this quiet title lawsuit on June 9, 2010 to remove any potential

cloud on title. U.S. Bank was the sole defendant as it was the only party listed in the Association's title report as potentially having a competing interest in the property.

U.S. Bank was properly served with process in the quiet title lawsuit but, yet again, it did not appear or answer within the time allowed by law. On June 15, 2010, the Association obtained a default order against U.S. Bank and a quiet title decree providing that the Association owned the property free and clear of any interest of U.S. Bank.

On June 21, 2010, U.S. Bank filed a motion to set aside the default order and to vacate the quiet title decree. The Superior Court commissioner granted U.S. Bank's motion. The Association filed a motion for revision, which was denied by the Superior Court judge.

The Association filed this appeal seeking to have the judge's order denying the motion for revision reversed and to have the quiet title decree affirmed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it ruled that U.S. Bank was entitled to notice of the Association's motion for default. CP 8-9.

2. The trial court erred when it ruled that U.S. Bank demonstrated "surprise" under CR 60(b)(1). CP 8-9.

B. Issues Pertaining to Assignments of Error

1. Whether an attorney's pre-litigation contacts constituted an informal appearance. (Assignment of Error 1.)

2. Whether an attorney's personal, subjective surprise that he didn't get notice of the Association's default motion is a reasonable excuse to vacate the quiet title decree when the attorney was not entitled to notice as a matter of law. (Assignment of Error 2.)

3. Whether U.S. Bank's failure to appear due to admittedly taking several weeks to route the lawsuit paperwork to its attorney is a reasonable

excuse to vacate the quiet title decree.

(Assignment of Error 2.)

III. STATEMENT OF THE CASE

The Association is a non-profit condominium association that obtained a judgment and foreclosure decree against the property for unpaid condominium assessments on October 12, 2007. CP 115-20. The foreclosure decree provided that the Association's lien was senior to any liens of mortgage lenders.¹ CP 119.

A sheriff's sale of the property was held on February 9, 2009 and the Association was the only bidder. CP 185. The one-year redemption period expired without redemption by any party and the Snohomish County sheriff issued a deed vesting title to the property in the Association. CP 187-88.

On or about February 25, 2010, the Association's attorney received a letter from an attorney representing U.S. Bank claiming to

¹ The Association's lien for unpaid condominium assessments is senior to deeds of trust in the amount of six months of assessments for common expenses pursuant to RCW 64.34.364(3).

dispute "the priority of the sheriff's deed" that was issued pursuant to the judicial foreclosure. CP 122. The attorney asked for a payoff of the "total amount of the judgment, including any attorney fees and advances for taxes" Id.

On March 2, 2010, the Association's attorney faxed a response explaining that there was no payoff to give as the Association now owned the property free and clear. CP 124. The Association also extended a settlement offer in the letter. Id. The Association never got a response.² CP 175.

Months later on June 9, 2010, in order to remove any potential cloud on title, the Association filed a complaint to quiet title to the property. CP 252-57. U.S. Bank was the only named defendant and was properly served with process in Seattle, Washington on May 17, 2010. CP 251. U.S. Bank did not appear or file an answer to the complaint within 20 days as allowed by CR 4. As a result, the Association obtained a

² This particular attorney for U.S. Bank never appeared in this lawsuit and is not even counsel of record for U.S. Bank.

default order (CP 190-91) against U.S. Bank and a quiet title decree on June 15, 2010. CP 192-93.

On July 13, 2010, on motion by U.S. Bank, the Superior Court commissioner entered an order setting aside the default order and vacating the quiet title decree. CP 5-7. The Association then filed a motion for revision. CP 210-14. The Superior Court judge denied the motion on the grounds that (1) U.S. Bank was entitled to notice of the Association's motion for default and (2) U.S. Bank (through its attorney) demonstrated "surprise" under CR 60(b). CP 8-9.

The Association now appeals the order denying the Association's motion for revision, requesting that the trial court's decision be reversed and the default order and quiet title decree be affirmed.

IV. SUMMARY OF THE ARGUMENT

The default order and quiet title decree are not void for the reason that U.S. Bank didn't get notice of the Association's default motion. U.S. Bank claims its attorney's pre-litigation

contacts constituted an informal appearance. However, the Washington State Supreme Court has directly rejected U.S. Bank's argument and held that pre-litigation contacts are not sufficient to constitute an appearance.

In addition, U.S. Bank did not provide sufficient evidence to satisfy its burden to have the quiet title decree vacated under CR 60(b)(1) due to "surprise." The court held that the U.S. Bank attorney's personal surprise warranted a vacation of the quiet title decree. However, the attorney was not entitled to notice as a matter of law and his personal surprise would solely be based on an incorrect interpretation of the law.

Regardless, this is a red herring and does not address what happened to the summons and complaint after U.S. Bank itself was served with process. Surprisingly, U.S. Bank actually admitted that the real reason it did not appear is because it took several weeks to have the summons and complaint routed to its attorney.

Case law establishes that U.S. Bank's failure to forward lawsuit paperwork to its attorney for several weeks after service is not a reasonable excuse for failing to timely appear in a lawsuit nor a reason to have the quiet title decree vacated.

V. ARGUMENT

A. The trial court erred when it vacated the default order and quiet title decree on the grounds that they were void and that U.S. Bank's attorney should have been given notice of the Association's default motion.

Whether pre-litigation contacts constitute an informal appearance and therefore entitle a party to notice of a motion for default is a question of law to be reviewed de novo. Morin v. Burris, 160 Wn.2d 745, 753, 161 P.3d 956 (2007).

The law is clear that a party who has not appeared in an action is not entitled to notice of a motion for default. CR 55(a)(3). In this case, U.S. Bank was served with the summons and complaint in this matter on May 17, 2010. CP 251. It is not disputed that U.S. Bank did not formally appear prior to entry of the default order and quiet title decree.

The question remains, nonetheless, whether U.S. Bank made an "informal appearance" when, more than three months prior to this lawsuit being filed, its attorney (again, who is not even counsel of record in this case) had some communication with plaintiff's counsel and, as U.S. Bank argues, demonstrated an "intent to defend the existing lien foreclosure action thereby requiring notice in the subsequent quiet title action." (Emphasis added.) CP 23.

First, this statement is misleading as there was no "existing" action at the time U.S. Bank's attorney contacted the Association's attorney. By that time, the Association's foreclosure lawsuit had been over for nearly two and a half years.³ This lawsuit under appeal had not been filed and would not be filed until several months after these informal contacts occurred.

Second, and most important, the Washington Supreme Court has ruled on this exact issue and rejected U.S. Bank's argument. Specifically, the Court held that "merely showing intent to defend before a case is filed is not enough to qualify

³ The 2007 case has long been over. Despite knowing about the decree since at least February 2010 (CP 47), U.S. Bank has not challenged it. The decree still remains the law of that case and good law governing the property.

as an appearance in court.” (Emphasis added.) Morin, 160 Wn.2d at 749. The Morin court expressly ruled that pre-litigation contacts are not sufficient to constitute an appearance for purposes of CR 55(a)(3). Id. at 753.

Therefore, as a matter of law, U.S. Bank did not timely appear in this lawsuit. The Association was entitled to entry of a default order under CR 55(c)(3) and the trial court erred in setting it aside.

B. The trial court erred when it granted the motion to vacate the quiet title decree under CR 60(b)(1) due to U.S. Bank’s “surprise.”

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) surprise” CR 60(b)(1).

Courts apply a four-part test to determine if a default judgment should be vacated under CR

60(b)(1): (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 surprise; (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).

The trial court focused on the second factor and ruled that U.S. Bank demonstrated "surprise."

1. U.S. Bank attorney's subjective, personal "surprise" that he didn't get notice of the Association's motion for default is based on an incorrect interpretation of the law.

The trial court ruled that U.S. Bank demonstrated "surprise by [its attorney] (and client) when default entered." CP 9. However, the

sole evidence of "surprise" offered by U.S. Bank was that its attorney was personally surprised to not get notice of the motion for default. CP 24, 47. As discussed supra, counsel for U.S. Bank's personal expectation that his pre-litigation contacts entitled him to notice was incorrect as a matter of law. Therefore, his personal surprise was grounded in an error of law that does not warrant vacating the quiet title decree.

Regardless, the subjective, personal surprise of U.S. Bank's attorney is a complete red herring and leaves the glaring question unanswered: Why didn't U.S. Bank itself respond after being served with process in Seattle on May 17, 2010?

2. U.S. Bank admits that the true reason it didn't appear is because it took several weeks for it to route the lawsuit paperwork to its attorney.

Surprisingly, U.S. Bank revealed the real reason that it didn't timely appear in the lawsuit when it admitted that "Because [it] uses numerous outside counsel to handle its matters,

it took several weeks before the quiet title pleadings were properly routed to [its attorney's] office." CP 18, 24.

In other words, U.S. Bank's excuse for not appearing is that it does not have internal procedures implemented to respond to service of process in a timely manner as required by the court rules. It is actually implying that, because it's a big bank with lots of attorneys, it therefore does not have to comply with state or local court rules. This is not an excusable reason to not timely appear in a lawsuit.

In fact, this excuse has been used before and was rejected by the Court of Appeals, Division III. In Cash Store, a company's store manager was served with a summons and complaint and did not forward it to the company's general counsel but rather sent the documents back to the plaintiff thinking the matter had been resolved. 116 Wn. App. at 839. Rejecting the company's claim that the manager's actions constituted mistake or excusable neglect, the court held that

if a company fails to respond to a complaint because someone other than general counsel accepted service of process and then neglected to forward the complaint, the company's failure to respond is deemed due to inexcusable neglect. Id. at 840. This appears to be exactly what happened here.

On the other hand, to the extent U.S. Bank is claiming that it does have procedures in place to respond to a lawsuit but, in this case, there was a breakdown in its internal procedures, this is also not a basis for vacating the judgment. As this Court has previously ruled, even 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).

Bottom line, U.S. Bank offers no reasonable excuse for not appearing in a timely manner. Its own attorney's personal surprise is based on a misplaced assumption that pre-litigation contacts

constituted an "informal appearance." And as U.S. Bank actually admitted to the trial court, the real reason it didn't appear was because it didn't get the lawsuit paperwork to its attorney in time because it uses many different attorneys. Therefore, the trial court erred as a matter of law in ruling that U.S. Bank was entitled to notice of the Association's motion for default and abused its discretion in vacating the judgment for "surprise" under CR 60(b)(1).

VI. CONCLUSION

The Association respectfully requests that the trial court's order setting aside the default order and vacating the quiet title decree be reversed.

Dated this 26th day of October, 2010

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Certificate of Service

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

That a true and correct copy Appellant's Opening Brief was caused to be delivered via legal messenger on the date signed below to counsel for the Respondent as follows:

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Signed at Seattle, Washington on October 28, 2010.


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