

69124-4

69124-4
FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2010 AUG 14 PM 2:36

No. 69124-4-1

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

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.

REPLY BRIEF OF APPELLANT

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	3
II.	ARGUMENT	5
	A. Plaintiff’s manufactured “failure to participate” standard has no foundation in the law.....	5
	B. <i>Bain v. Metropolitan Mortg. Group, Inc.</i> has no application to the case at bar.....	6
	C. The Superior Court Imputed the Conduct of McCarthy & Holthus to AMH and the Plaintiff continues to do so.....	7
III.	CONCLUSION	8

Cases

<i>White v. Holmes</i> , 73 Wn. 2d 348, 438 P.2d 581 (1968).....	3, 7
<i>Bain v. Metropolitan Mortg. Group, Inc.</i> , 175 Wn. 2d 83, 98, 285 P.3d 34 (2012).....	4, 5, 6, 7
<i>Morin v. Burris</i> , 160 Wn. 2d 745, 161 P.3d 956 (2007).....	5

Rules

CR 55.....	4
------------	---

II. INTRODUCTION

In its opening brief, Defendant Asset Management Holdings, LLC (“AMH”) demonstrated that the King County Superior Court failed to properly weigh the four factors presented in *White v. Holmes*¹ when it denied AMH’s Motion to Set Aside the Entry of Default and Vacate the Default Judgment. AMH further demonstrated that even though McCarthy & Holthus was counsel of record in this case, AMH did not receive notice of the default judgment until the Plaintiff attempted to domesticate the judgment in Florida in February of 2012. The domestication occurred more than a year after the Plaintiff obtained the default judgment on November 15, 2010. In Appellee’s untimely² Response Brief, the Plaintiff failed to provide any explanation for her total lack of diligence in initiating collection of the judgment until after a year had passed.

Throughout her response the Plaintiff alleges that AMH had a duty to at least participate in the litigation or to monitor the litigation. However, no law is cited to support this standard created by the Plaintiff. Indeed, in the Plaintiff’s misleadingly titled “Unrefuted Facts” section, she states that

¹ 73 Wn. 2d 348, 438 P.2d 581 (1968).

² Appellee filed an incomplete draft of her Response Brief on June 1, 2015. The Court rejected the draft on June 25 and was told by Ms. Huelsman that the final Response Brief would be filed the next day. Appellee did not file the Response Brief until July 15, 44 days after the original due date.

“Certainly, there is a requirement that a participant in litigation exercise diligence about the litigation.” Resp. Br. 14. Plaintiff cites no law in support of these numerous assertions.

AMH did not receive notice of the default motion despite the Plaintiff’s knowledge that McCarthy & Holthus had not filed its notice of withdrawal. Plaintiff’s subsequent attempts to serve AMH by mailing the default pleadings to AMH was returned to the Plaintiff as “undeliverable” or sent to an incorrect address.

Once judgment had been entered, the Plaintiff waited for over a year to execute the judgment. Plaintiff’s delay in seeking to collect the judgment until after the year within which AMH could have objected under CR 55 begs the question, what were Plaintiff’s motives behind waiting so long to seek satisfaction of the judgment?

Had AMH received proper notice of the default proceeding it would have demonstrated that it 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.

In her response, the Plaintiff mentions in passing that the Supreme Court’s decision in *Bain v. Metropolitan Mortg. Group, Inc.*³ affects

³ 175 Wn. 2d 83, 285 P.3d 34 (2012)

AMH's defense to Plaintiff's claims. As discussed in greater detail below, *Bain* dealt with a convoluted issue related to the Mortgage Electronic Registration System Inc. ("MERS"). *Id.* at 98, 285 P.3d at 41. *Bain* has no bearing on a case where the holder of a note has an agent acting on its behalf and the principal is known, as AMH acted on behalf of the known principal, 10 AMH.

III. ARGUMENT

A. Plaintiff's manufactured "failure to participate" standard has no foundation in the law.

Plaintiff imputes a duty to AMH to either participate or monitor the litigation throughout her brief. See Resp. Br. at 4, 5, 14, 15, 16, 17, 21, 22, 24, 27, and 29. However, the duty is not on the defendant to constantly check the docket for default motions. The duty is for the plaintiff to provide proper notice of default to the defendant. CR 55(a)(3). The Plaintiff cites one case, without any specificity, for the proposition that that litigants must maintain some level of responsibility for their participation in the legal process. Resp. Br. at 19 (citing *Morin v. Burris*, 160 Wn. 2d 745, 161 P.3d 956 (2007)). This is a rather obvious statement but *Morin* does not relieve a plaintiff of her duty to provide notice when moving for default. Instead, *Morin* discusses informal notices of appearances. *Id.* at 755, 161 P.3d at 962.

Here, it is undisputed that McCarthy & Holthus appeared on behalf of AMH. Resp. Br. at 22. What is peculiar is that the Plaintiff failed to ever provide proper notice to AMH despite knowing that McCarthy & Holthus was still AMH's counsel of record because it had not filed its Notice of Intent to Withdraw. Resp. Br. at 15. AMH was not provided notice of any kind that related to the default until the Plaintiff attempted to domesticate the default judgment in Florida, more than a year after its entry. CP 1185. It is curious that the Plaintiff waited over a year, past the time allowed by CR 55 to object to a default judgment, before attempting to collect on the judgment.

B. *Bain v. Metropolitan Mortg. Group, Inc.* has no application to the case at bar.

Bain held that MERS could not foreclose a mortgage because it is an “ineligible ‘beneficiary’ ...if it never held the promissory note or other debt instrument secured by the deed of trust.” *Bain*, 175 Wn. 2d at 110, 285 P.3d at 47. However, the *Bain* Court stated that “nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents.” *Id.* at 106, 285 P.3d at 45. The Court pointed out that MERS could not be an agent for the purpose of foreclosing a mortgage because “its principals in the two cases before us remain unidentified.” *Id.*

at 107, 285 P.3d at 45. MERS was unable to establish that it was “an agent for a lawful principal.” *Id.*

AMH serviced the Plaintiff’s mortgage on behalf of 10 AMH. (CP 1184). AMH was the agent of 10 AMH with regards to the Plaintiff’s mortgage. AMH’s principal and the beneficiary of the note secured by the deed of trust, 10 AMH, was known at all times and is known now. The case at bar could not be more different than *Bain*, which involved MERS, an entity that, among other things, obscures the identity of the beneficiary so the financial industry may divide and sell various mortgages in bulk. 10 AMH and AMH worked closely together with AMH servicing the Plaintiff’s mortgage on behalf of 10 AMH. 10 AMH was always known to be the beneficiary of the Plaintiff’s deed of trust.

C. The Superior Court Imputed the Conduct of McCarthy & Holthus to AMH and the Plaintiff continues to do so.

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. *Holm*, 73 Wn. 2d at 354-55, 438 P.2d at 585-86.

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. As AMH demonstrated in its opening brief, the trial court imputed McCarthy & Holthus's negligence onto AMH. The trial court excoriated the negligence of McCarthy & Holthus and then imputed this negligence onto AMH. The Plaintiff also complains that AMH blames McCarthy & Holthus. See Resp. Br. at 14. AMH never received notice of the default proceedings because of the negligence of McCarthy & Holthus. Of course AMH blames McCarthy & Holthus for its failure of representation. However, while McCarthy & Holthus remained counsel of record, AMH was entitled to notice of the default proceedings. Notice it never received.

In accord with the relevant case law set forth in AMH's opening brief, AMH should not be punished for the negligence of McCarthy & Holthus.

IV. 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 14 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