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COURT OF APPEALS NO. 74908-1-I

KING COUNTY SUPERIOR COURT NO. 15-2-12970-8

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

DANIEL and KRIST PETERSON,

Appellant,

v.

U.S. BANK, N.A.

Respondent.

---

APPEAL FROM SUPERIOR COURT FOR KING COUNTY

---

# PETITIONERS DANIEL and KRISTI PETERSON'S OPENING BRIEF

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STATE OF WASHINGTON
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## I. Introduction

Appellants Daniel and Kristi Peterson, Defendants in the court below, seek review of the *Order of Default and Default Judgment Against Defendants Daniel C. Peterson and Kristi J. Peterson* (App. 1)[1] and the *Order on Defendant* [sic] *Daniel and Kristi Peterson's Consolidated Motion Vacate This Court's Order of Default Judgment Dated January 22, 2016 and Motion to Dismiss* (App. 2; CP 172-173).

These orders are void for lack of personam jurisdiction.

The Respondent, U.S. Bank, N.A. (the Bank), filed a *Complaint* on May 28, 2015 seeking relief under Ch. 61.12 RCW. However no proof of service on any Defendant was filed.

Subsequently the Bank filed a *Lis Pendens* on August 19, 2015 but again no Defendant was served.

Not until after November 15, 2015, when an *Amended Summons* and *First Amended Complaint* was filed did the Bank begin to attempt to serve the Defendants.

While the Bank filed "proof of service" for Daniel Peterson, Mr. Peterson showed by competent and admissible evidence that (1) this

[1] Due to an error in designating the clerk's papers this order was omitted. Counsel for the Peterson's will move to correct this omission with or shortly after the filing of this brief. The order is an appendix to this brief and the order was noted and attached to the Notice of Appeal so the Court and opposing counsel can find it in either until the clerk's papers are amended.

purported service did not occur at Mr. Peterson's residence nor a place of "usual abode" and (2) Mr. Peterson was not and could not have been present at the time and place of the purported service.

Nevertheless, the Honorable Judge Samuel Chung of the King County Superior Court (Trial Court) refused to vacate the *Order of Default and Default Judgment Against Defendants Daniel C. Peterson and Kristi J. Peterson.*

## II. Assignments of Error

1. The Trial Court failed to vacate a void order.
    a. Did the Trial Court have a nondiscretionary duty to vacate?
2. The Trial Court failed to recognize that by combining an order for default, vacated under CR 55, and order for default judgment, vacated under CR 60, its order was subject to vacation pursuant to two or more procedures.

. What rules govern vacation of orders for default and orders for default judgment?

a. Were the Petersons obligated to do anything more than they did under the applicable rules?

3. When the Petersons moved for that order to be vacated, the Trial Court failed to "enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding

who may be affected thereby to appear and show cause why the relief asked for should not be granted".

. To the extent CR 60(e) applied, who was responsible for initiating a show cause hearing?

4. The Trial Court may have erroneously believed the Petersons were required to proffer a meritorious defense.

. Were the Petersons required to proffer a meritorious defense as a condition precedent to vacation of a void order?

5. The Trial Court justified denying the Peterson's motion by ruling that the Peterson's had failed to comply with CR 60(e), when the alleged failures to comply were either inapposite or not the Peterson's responsibility.

. Was the Trial Court's refusal to vacate proper, equitable and in the spirit of substantial justice?

## III. Statement of the Case

It is a terrible irony that a Washington State Court should uphold an actual denial of due process against the Peterson's on the grounds of a perceived denial of procedural due process that did not deprive the Bank of an opportunity to defend.

The Bank initiated this case on May 28, 2015 by filing its original *Complaint*. CP 1-36. According to the *Complaint*, the Petersons had failed

to pay any of the installments due on a mortgage loan since June 1, 2009. *Id.* at 4. On the day it was filed, the statute of limitations on the first missed payment would have expired in just four days. RCW 4.16.040(1). The *Complaint* was filed just in time to toll the statute of limitations; all the Bank needed to do was serve just one Defendant. RCW 4.16.170.

However no proof of service on any Defendant was filed with the Trial Court for over five months. CP *passim*. It appears the only actions taken in the interim were the filing of a *Lis Pendens* (CP 42-44); filing an *Amended Summons* (CP 45-46) and *First Amended Complaint* (CP 49-92) and a change of judge.

The *Lis Pendens* was filed on August 19, 2015. CP 42-44. Once again, no defendant was personally served within 60 days and no publication of the summons was made. CP *passim*; RCW 4.28.320 (service requirements for lis pendens).

Nine defendants were named in the *First Amended Complaint*. CP 49-51. Though all were allegedly served (CP 93-100; 126-129; 133; 137; 141; 149; 150; 160), only one filed a notice of appearance, the Internal Revenue Service. CP 130-32.

The *Certification of Service* related to Mr. Peterson states he was served at 22416 NE 13th Court in Sammamish, Washington at 1:19PM on November 16, 2015. CP 95. That property is neither Mr. Peterson's

residence nor a place of "usual abode". CP 151-153 ¶ 2. It is a property owned and leased by the Petersons. *Id.* ¶ 3. At the time, Rosemary Calvin was the lessee and Mr. Peterson had no reason to be present there and was not present there on November 16, 2015. *Id.* ¶¶ 4-5; 10-15. Mr. Peterson filed an affidavit with the Trial Court to this effect. CP 151-153. His declaration was uncontested in subsequent motion practice. CP 155-160.

The Petersons reside at 3224 N. 31st Street in Tacoma, Washington. CP 151-153 ¶ 2. One of the support staff at Stafne Law Firm was able to acquire this address with no more information than that which is available on the face of the *Amended Summons* and *First Amended Complaint* and access to the internet.

Mr. Peterson also maintains a business office at 3501 S. 38th Street, Suite 109 in Tacoma, Washington. CP 151-153 ¶ 8.This information was just as easily ascertained. Moreover the Bank sends monthly statements related to the servicing of the loan on the 22416 NE 13th Court property to Mr. Peterson's business office and therefore knew he could be served at this location. CP 151-153 ¶¶ 8-9.

On November 16, 2015, the day he was allegedly served in Sammamish, Mr. Peterson was in Tacoma, Washington all day. CP 151-153 ¶¶ 11-13. Between the hours of 12:30 PM and 4:00 PM, , at the time he was allegedly served in Sammamish, Mr. Peterson was in a meeting in

Tacoma with a technology and web design consultant, Mataio Poching. CP 151-153 ¶ 13. Both Mr. Peterson and Mr. Poching filed affidavits with the Trial Court attesting to Mr. Peterson's whereabouts at the time of alleged service. CP 151-153; 169-170. These declarations were also uncontested is subsequent motion practice. CP 155-160.

Mr. Peterson did not receive notice of the proceedings until December 21, 2015, and only then by accident, when Rosemary Calvin vacated the 22416 NE 13th Court property and Mr. Peterson conducted an inspection of the premises. CP 151-153 ¶¶ 4-7. An order of default was entered just eight days later and a consolidated order of default and default judgment was entered within thirty days. App. 1.[2] Nevertheless, Mr. Peterson retained counsel and was seeking vacation of these orders by February 4, 2016. App. 3;[3] CP 151-153.

Mr. Peterson contended that the Trial Court lacked jurisdiction over his person and the orders were void. *Id*; CP 161-168.

Nevertheless, the Trial Court refused to vacate its orders or consider whether the Trial Court had jurisdiction to enter those orders in the first instance. CP 172-173. The Trial Court cited *K. Tagland* 14 Wash.

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[2] As previously noted this order was inadvertently omitted and the error will be corrected shortly.

[3] The Peterson's motion to vacate was also mistakenly omitted from the clerk's papers and the error will be corrected shortly.

Prac. § 9.33 and asserted failure to comply with CR 60 as the basis for denying any relief. *Id.*

## IV. Argument

### A. Courts Have a Duty to Vacate Void Judgments.

Failure to properly serve a defendant prevents the court from obtaining personal jurisdiction over the defendant. *Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131 (1996) *rev. denied*, 130 Wn.2d 1004 (1996). Judgments entered without personal jurisdiction are void. *Id.* (citing *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces,* 36 Wash.App. 480, 486, 674 P.2d 1271 (1984)). Courts have a nondiscretionary duty to vacate void judgments. *Id.* (citing *Brenner v. Port of Bellingham,* 53 Wash.App. 182, 188, 765 P.2d 1333 (1989)).

### B. The Peterson's Moved to Vacate the Order of Default and Default Judgment Under Both CR 55(c) and CR 60(b)(5)

#### 1. Both Rules Merely Require the Petersons File a Motion

Vacation of an order for default is governed by CR55(c) and vacation of a order for default judgement is governed by CR 60(b). CR 55(c)(1) ("For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, ***if a judgment by default has been entered***, may likewise set it aside in accordance with rule 60(b)."(emphasis added)).

Despite the fact that the *Order of Default and Default Judgment Against Defendants Daniel C. Peterson and Kristi J. Peterson* is subject to two rules, both rules only require that a motion be filed. Even if it were simplified and any and all relief contemplated under CR 55, not just relief for "judgment by default" was had "in accordance with rule 60(b)" there would still be no issue as, again, one must merely file a motion. CR 60(b).

**2. CR 60(e) Imposed No Additional Requirements on the Petersons**

To the extent CR 60(e) was at that point applicable, again, all that was required, at least initially, is that the Peterson's file a motion supported by a declaration (which the Peterson's did). CR 60(e)(1); App. 3; CP 151-153.

The Bank's position that the Peterson's failed to comply with the rules by "not seeking" a show cause hearing and failing to assert a "meritorious defense" were *non sequiturs*.

**C. Additional Requirements of CR 60(e) Were Inapposite**

**1. Court Rules-Interpretation and Purpose**

When interpreting court rules, the court approaches the rules as though they had been drafted by the Legislature. *State v. Greenwood*, 120 Wn. 2d 585, 592, 845 P.2d 971 (1993). Court rules, like statutes, should be construed to foster the purposes for which they were enacted. *Id.* at 593.

Court rules should be harmonized rather than construed in a manner that renders one superfluous. *Id.* at 595.

The overarching purpose for court rules is to govern procedure so as "to promote justice by ensuring a fair and expeditious process". GR 9(a). To this end the rules should be "clear and definite in application". GR 9(a)(6). The Court Rules have been revised on multiple occasions to "eliminate or at least to minimize technical miscarriages of justice" and "allow cases to proceed on the merits in the absence of serious prejudice to other parties." *Petrarca v. Halligan*, 83 Wn. 2d 773, 775, 522 P.2d 827 (1974); *O'Neill v. Jacobs*, 77 Wash. App. 366, 370, 890 P.2d 1092 (1995) (citing *In re Saltis,* 94 Wn.2d 889, 896, 621 P.2d 716 (1980); *see also Christensen v. Ellsworth*, 162 Wn. 2d 365, ___, 173 P.3d 228 (2007).

**2. An Order to Show Cause Should Be Issued By the Court**

The Petersons filed a motion seeking vacation of the *Order of Default and Default Judgment Against Defendants Daniel C. Peterson and Kristi J. Peterson* in the Trial Court that (1) stated the grounds upon which relief was sought and (2) was supported by declarations. App. 3; CP 151-153.

If CR 60(e) was applicable, the Trial Court should have issued an order "fixing the time and place of the hearing...[to] show cause why the relief asked for should not be granted." CR 60(e)(2). Instead, the Bank

filed a response claiming that the Petersons had failed to request the hearing and had failed to assert a "meritorious defense". CP 155-157. The Peterson's replied by observing these claims were inapposite. CP 161-166.

It is the court who is required to act to set a hearing to show cause when a motion to vacate is made:

> **Upon the filing of the motion and affidavit, the court shall enter an order** fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

CR 60(e)(2) (emphasis added).

The Peterson's were required to file a motion stating the grounds upon which relief was sought together with supporting declarations. CR 60(e)(1). That's exactly what they did. Until the Trial Court entered an order setting a hearing they had no further obligations. *See* CR 60(e)(3) (once the order was issued the Peterson's were required to serve it on "all parties affected in the same manner as in the case of summons in a civil action").

**3. The Peterson's Were Not Required to Proffer a Meritorious Defense**

"There is no need for the demonstration of a meritorious defense to vacate a void order." *E.g. State ex rel. Turner v. Briggs* , 94 Wn.App. 299, 305, 971 P.2d 581 (1999); *Mid-City Materials*, 36 Wash.App. at 486

("[The]meritorious defense requirement is immaterial where the court entering an in personam judgment had no jurisdiction of the defendants".).

**D. Denial of the Peterson's Motion was Inappropriate**

The Trial Court cited *K. Tagland* 14 Wash. Prac. § 9.33 and asserted failure to comply with CR 60 as the basis for denying any relief. CP 172-173. Even if the Bank's objections to Peterson's motion had any merit at all, the Bank was in no way prejudiced by the process. "[F]ailure to [strictly] comply with CR 60(e) does not raise a jurisdictional issue...failure to [properly] serve [provided the Plaintiff has actual notice and appears] is a harmless deviation from CR 60(e)(3). *Lindgren v. Lindgren*, 58 Wn.App. 588 , 594, 794 P.2d 526 (1990).

**1. The Bank Appeared and Defended**

Clearly, the Bank was noticed, they were served with the motion even though no show cause hearing had been ordered. The Bank was present and able to mount a defense to the Peterson's motion. The Bank appeared but chose to seek refuge in a bizarre procedural argument. CP 155-157.

**2. The Bank's Defense Was Entirely Procedural; They Did Not Contest the Declarations Regarding Failure of Service or Argue the Orders Were Not Void**

As the Peterson's observed during motion practice, the Bank never contested the declarations in support of the Peterson's motions and never argued the orders the Peterson's sought to have vacated were not void. *See* CP 155-157 (the Bank's response to the motion to vacate).

The Bank's only argument was procedural; that in some unexplained way the Peterson's sought to deny the Bank notice or an opportunity to be heard. Nothing could have been further from the truth. The Petersons even conceded in response to the Bank's argument that "the Court can easily treat the motion as if made under CR 60(e) and set a "show cause" hearing". CP 163:20-22.

**3. The Court's Decision Was Inequitable**

In reviewing a default judgment a court's "principal inquiry should be whether the default judgment is just and equitable." *Trinity Univ. Ins. v. Ohio Cas. Ins. Co.*, 176 Wash. App. 185, 194, 312 P.3d 976 (2013). Depriving the Petersen's of due process is neither just or equitable. Wash. Const. Art. I, § 3. Enforcing a void judgment when a party has been denied due process is neither just or equitable. *Scott*, 82 Wn.App. at 6. Upholding judgment in a case that should have been dismissed out of hand is neither just nor equitable. *Bethel v. Sturmer*, 3 Wn. App. 862, 864, 866, 479 P.2d 131 (1970) (without timely service the action is "wholly

abortive" and failure to acquire personal jurisdiction entitles a defendant to "immediate dismissal").

## V. Conclusion

The Bank failed to serve the Petersons, or any Defendant, with the initial *Complaint* so as to toll the statute of limitations.

The Bank failed to serve the Petersons at all. The Court therefore lacked jurisdiction over the persons of Daniel and Kristi Peterson.

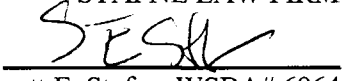
The Trial Court's Orders are void for lack of jurisdiction.

The Bank cannot be heard to complain when those Orders are vacated because the Bank's failure to serve the Peterson's and subsequent lack of jurisdiction made the Orders void. This is especially true because the Petersons ***actually notified*** the Bank of the pending vacation of those Orders and gave the Bank the opportunity to defend itself (which it did not) against the Peterson's allegations, something the Bank failed to do in the first instance.

DATED this 5th day of July, 2016 at Arlington, Washington.

Respectfully Submitted,

STAFNE LAW FIRM



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## CERTIFICATE OF SERVICE

I, Linda Avery Rodriguez, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 5th day of July, 2016, I caused to be served a true and correct copy of Petitioners Dan and Kristi Peterson's Opening Brief to defendants in the above title matter by causing it to be delivered to:

| | |
|---|---|
| Katrina E. Glogowski<br>Allegiant Law Group<br>22000 64th Ave W #2<br>Mountlake Terrace, WA 98043<br>Phone: 206-903-9966<br>katrina@glogowskilawfirm.com | ☐Facsimile<br>☐Express Mail<br>☑U.S. First Class Mail<br>☐Hand Delivery<br>☐Legal Messenger<br>☑Electronic-Email |
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| Kerry J. Keefe<br>Assistant US Attorney<br>Western District of WA<br>US Attorney's Office<br>700 Stewart St, Suite. 5220<br>Seattle, WA 98101-1271<br>kerry.keefe@usdoj.gov | ☐Facsimile<br>☐Express Mail<br>☑U.S. First Class Mail<br>☐Hand Delivery<br>☐Legal Messenger<br>☑Electronic-Email |

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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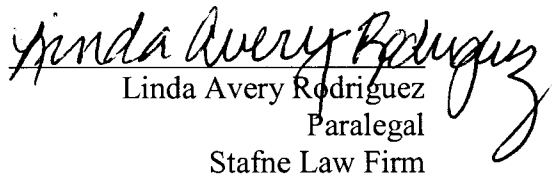
DATED this 5th day of July, 2016 at Arlington, Washington.



Linda Avery Rodriguez
Paralegal
Stafne Law Firm

# APPENDIX 1

FILED
KING COUNTY, WASHINGTON

JAN 22 2016

DEPARTMENT OF
JUDICIAL ADMINISTRATION

EXP07

SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

| | |
|---|---|
| U.S. Bank National Association, successor by merger to U.S. Bank National Association ND,<br>Plaintiff,<br>vs.<br>Daniel C. Peterson and Kristi J. Peterson, et al,<br>Defendants | Case No.: 15-2-12970-8 KNT<br><br>ORDER OF DEFAULT AND DEFAULT JUDGMENT AGAINST DEFENDANTS Daniel C. Peterson and Kristi J. Peterson<br><br>*Clerk's Action Required* |

**JUDGMENT SUMMARY**

| | | |
|---|---|---|
| Judgment Creditor: | U.S. Bank National Association, successor by merger to U.S. Bank National Association ND | |
| Judgment Debtor: | Daniel C. Peterson and Kristi J. Peterson | |
| Principal Judgment Amount: | $ | *reserved* |
| Interest on Said Judgment: | $ | *reserved* |
| Attorneys' Fees: | $ | *reserved* |
| Costs: | $ | *reserved* |
| Attorney for Judgment Creditor: | Katrina E. Glogowski<br>Allegiant Law Group | |

Judgment Shall Bear Interest at 12% Per Annum



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FAX: (206) 405-2701

THIS MATTER having come on for hearing upon the motion of the plaintiff for a default judgment against the defendant, said motion being supported by the declaration of the attorneys for plaintiff, and it being made to appear to the satisfaction of this court that this is an action for a sum certain in money and that the defendant is in default, NOW, THEREFORE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. This matter involves real property commonly known as 22416 NE 13th Ct, Sammamish, WA 98074, King County, Washington; APN: 357840-1410-00 and legally described as: LOT(S) 141, INGLEWOOD GLEN, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 112 OF PLATS, PAGE(S) 60 THROUGH 62, KING COUNTY, WASHINGTON.

2. The defendant is in default and such default is hereby entered.

3. That there is no substantial material fact of the right of plaintiff to be granted relief as prayed for in the complaint and provided for by statute.

4. That Plaintiff's Deed of Trust be declared a valid first lien upon the land and the premises herein described; that the Plaintiff's Deed of Trust be foreclosed and that the property covered thereby be sold at a foreclosure sale in the manner provided by law, and that the proceeds thereof be applied on said judgment and increased interest and such additional amounts as the Plaintiff may advance for taxes, assessments, municipal charges, and such other items as may constitute liens upon the property, together with insurance and repairs necessary to prevent the impairment of the security, together with interest thereon from the date of payment.

5. That if any deficiency judgment remains after application of the proceeds of such sale thereon, plaintiff may request a deficiency judgment against Defendant Daniel C. Peterson and Kristi J. Peterson.

6. That by such foreclosure and sale, the rights, claims, ownership, liens and demands of each of the defendants and persons claiming by, through, or under them



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subsequent to the execution of the Deed of Trust should be adjudged inferior and subordinate to Plaintiff's Deed of Trust lien and be forever foreclosed, expect only for the statutory right of redemption allowed by law.

7. That Plaintiff be permitted to become a bidder and purchaser at the foreclosure sale.

8. That each defendant and all persons claiming under each defendant, after execution f the Deed of Trust, whether a s alien claimant, judgment creditor, claimant under a junior trust deed, purchaser, lienholder, or otherwise be barred and foreclosed from all rights, claims, interests, or equity of redemption in the Property and every part of the Property when the time for redemption has elapsed.

9. That Defendant Daniel C. Peterson and Kristi J. Peterson be personally liable for payment of the obligation secured by the Deed of Trust and that a deficiency judgment be ordered following proceedings prescribed by law.

10. That the Sheriff be directed, after the time for redemption has elapsed, to execute a deed to the purchaser of the Property at the sale, and directing that any such purchaser be let into possession upon production of the Sheriff's Deed.

11. Plaintiff may supplement the above monetary judgment upon ex parte application with supporting documentation.

DONE IN OPEN COURT 1/22/16

JUDGE/COURT COMMISSIONER

Presented by:
Allegiant Law Group

/s/ Katrina E. Glogowski
Katrina E. Glogowski, WSBA #27483
Attorneys for Plaintiff



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# APPENDIX 2

27497227

SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

| | |
|---|---|
| U.S. Bank National Association, successor by merger to U.S. Bank National Association ND,<br><br>Plaintiff,<br><br>vs.<br><br>Daniel C. Peterson and Kristi J. Peterson, et al,<br><br>Defendant | Case No.: 15-2-12970-8 KNT<br><br>ORDER ON DEFENDANT DANIEL AND KRISTI PETERSON'S CONSOLIDATED MOTION VACATE THIS COURT'S ORDER OF DEFAULT JUDGMENT DATED JANUARY 22, 2016 AND MOTION TO DIMISS |

THIS MATTER having come on for hearing before the undersigned, upon the motion of the plaintiff for an order for summary judgment in this matter;

The Court having examined the file, considering the moving and opposition papers, arguments of counsel and the following specific documents:

1. Defendants Daniel and Kristi Peterson's Consolidated Motion to Vacate this Court's Order of Default Judgment Dates January 22, 2016 and Motion to Dismiss
2. Plaintiff U.S. Bank's Response
3. Defendants Daniel and Kristi Peterson's Reply (if any)

A motion to vacate must be filed in accordance with the procedures specified by CR 60.
K. Tegland 14 Wash. Prac. § 9.33 (2009).

IT IS HEREBY ORDERED that defendants Consolidated Motion Vacate this court's Order of Default Judgment dated January 22, 2016 and Motion to Dismiss is hereby DENIED. without prejudice.

DONE IN OPEN COURT 2/22/2016

JUDGE/COURT COMMISSIONER

Samuel S. Chung

Presented by:
Glogowski Law Firm, PLLC

/s/Sara Shapland
Katrina E. Glogowski, WSBA #27483
Sara R. Shapland, WSBA #49775
Attorneys for Plaintiff

# APPENDIX 3

HONORABLE SAMUEL CHUNG
HEARING DATE FEBRUARY 16, 2016

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

| | |
|---|---|
| U.S. Bank, N.A.<br>Plaintiffs,<br><br>v.<br><br>Daniel and Kristi Peterson, et al.<br>Defendants. | CASE NO. 15-2-12970-8<br><br>DEFENDANT DANIEL AND KRISTI PETERSON'S CONSOLIDATED MOTION VACATE THIS COURT'S ORDER OF DEFAULT JUDGMENT DATED JANUARY 22, 2016 AND MOTION TO DISMISS<br><br>[Clerk's Action Required] |

## I. Introduction

Defendant Daniel Peterson was inspecting the premises at 22416 NE 13th Court, Sammamish, WA 98074 (Subject Property) on December 21, 2015 which had recently been subject to occupancy by lessee Rosemary Calvin when he discovered a copy of U.S. Bank, N.A.'s (the Bank) *Amended Summons* and *First Amended Complaint.* Ms. Calvin had moved out the previous day and Mr. Peterson was doing an initial inspection and securing the property. This is the first he has heard of these proceedings. Mr. Peterson was aware of the



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dispute, generally, by virtue of prior negotiations, including mediation, with the Bank but was never informed that the Bank had commenced an action in this Court.

The Petersons respectfully requests this Court vacate its *Order of Default and Default Judgment* for lack of personal jurisdiction, cancel the *Lis Pendens* and dismiss the case.

## II. Statement of Facts

The Bank initiated this case on May 28, 2015 by filing its original *Complaint* in this Court.

Thereafter no proof of service on any Defendant was filed with the Court for over five months. It appears the only actions taken in the interim were the filing of a *Lis Pendens*; filing an *Amended Summons* and *First Amended Complaint* and a change of judge.

The *Lis Pendens* was filed in this Court on August 19, 2015. No defendant was personally served within 60 days and no publication of the summons was made.

The Certification of Service related to Mr. Peterson states he was served at the Subject Property at 1:19PM on November 16, 2015. The Subject Property is neither Mr. Peterson's residence nor a place of "usual abode". It is a property owned and leased by the Petersons. At the time Rosemary Calvin was the lessee.

The Petersons reside at 3224 N. 31st Street in Tacoma, Washington. One of the support staff at Stafne Law Firm was able to acquire this address with no more information than that which is available on the face of the *Amended Summons* and *First Amended Complaint* and access to the internet.

Mr. Peterson also maintains a business office at 3501 S. 38th Street, Suite 109 in Tacoma, Washington. The Bank sends monthly statements related to the servicing of the loan on the Subject Property to this address.



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On November 16, 2015 Mr. Peterson was in Tacoma, Washington all day. Between the hours of 12:30 PM and 4:00 PM, Mr. Peterson was in a meeting with a technology and web design consultant, Mataio Poching.

## III. Issues Presented

Did the Court acquire personal jurisdiction over Defendant Daniel Peterson?

Is the Court's *Order of Default Judgment* void?

Is Peterson entitled to dismissal of the action?

Is the *Lis Pendens* void and subject to cancellation?

## IV. Authority

### A. Failure of Service Voids a Default Judgment and Requires Dismissal of the Action

"First and basic to any litigation is jurisdiction. First and basic to jurisdiction is service of process." *Painter v. Olney,* 37 Wn. App. 424, 427, 680 P.2d 1066 *review denied,* 102 Wn.2d 1002 (1984); CR 12(b)(2); *accord Adkinson v. Digby, Inc.*, 99 Wn. 2d 206, 207, 660 P.2d 756 (1983) (voluntary appearance does not abrogate the requirement of service).

The Bank initiated this case on May 28, 2015 by filing its original *Summons* and *Complaint* in this Court. Dkts. 1 and 5; CR 3 and 4; RCW 4.28.020; RCW 4.16.170 (statute of limitations tolled for 90 days to allow for service of process). The Court's jurisdiction in the case remains "conditional" until the Defendants are served. RCW 4.28.020; *E.g. Bethel v. Sturmer*, 3 Wn. App. 862, 864, 479 P.2d 131 (1970). If a complaint is filed first, a plaintiff must serve at least one defendant within 90 days. RCW 4.16.170. Failure to properly serve a defendant prevents the court from obtaining personal jurisdiction over the defendant. *Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131 (1996). Judgments entered without personal jurisdiction are void. *Id.* (citing *Mid-City Materials, Inc. v. Heater Beaters Custom*



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*Fireplaces,* 36 Wash.App. 480, 486, 674 P.2d 1271 (1984)). Courts have a duty to vacate void judgments. *Id.* (citing *Brenner v. Port of Bellingham,* 53 Wash.App. 182, 188, 765 P.2d 1333 (1989)).

Mr. Peterson was not served with either the original *Summons* and *Complaint* or the *Amended Summons* and *First Amended Complaint.* Decl. of Daniel Peterson ¶¶ 7; 10-13.

It does not appear that there was **any attempt** to serve the original *Summons* and *Complaint* on any of the Defendants named therein. *Generally* Dkt.

In a matter of first impression, Washington's Supreme Court liberally construed RCW 4.16.170 so that service on merely one defendant in a case with multiple defendants would suffice to "toll[] the statute of limitation as to unserved defendants". *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn. 2d 325, 327, 815 P.2d 781 (1991). However, the Court also observed:

> Plaintiffs must proceed with their cases in a timely manner as required by court rules, **and must serve each defendant in order to proceed with the action against that defendant.** A plaintiff who fails to serve each defendant risks losing the right to proceed against unserved defendants if the served defendant is dismissed[.]

*Id.* at 329-30 (emphasis added).

In this case, there is no evidence the *Sidis* "safe harbor" applies as no defendant was timely served. No proof of service on **any Defendant** was filed with the Court for over five months. *Generally* Dkt. Only the Internal Revenue Service filed a Notice of Appearance. *Id.* No defendant has otherwise appeared, filed an answer or otherwise acted to defend in this action whatsoever. *Id.*

Under these conditions the judgment is void against The Petersons; vacation and dismissal is the appropriate remedy. *Lindgren v. Lindgren*, 58 Wash. App. 588, 597, 794 P.2d



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526 (1990) (a default judgment is void if a defendant did not receive a proper summons.); *Bethel*, 3 Wn. App. at 865-66 (immediate dismissal is remedy for lack of jurisdiction).

**B. The *Lis Pendens* is Void**

The *Lis Pendens* was filed in this Court on August 19, 2015. Dkt. 6. No defendant was personally served within 60 days and no publication of the summons was made. *Generally* Dkt.

A *Lis Pendens* "shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing." RCW 4.28.320. Peterson is entitled to an order by this Court canceling the *Lis Pendens*. *Id.* Peterson is also entitled to actual damages and for reasonable attorneys' fees. RCW 4.28.328.

**C. If the Court Finds the Delay of Five Months Does Not Automatically Require Vacation and Dismissal and the Bank Continues to Assert Service Was Eventually Perfected, the Parties Are Entitled to a Hearing on the Sufficiency of Service**

Mr. Peterson's *Declaration* is sufficient to warrant an additional hearing in the event the Court deems the foregoing reasons do not oblige the Court to vacate its judgment and dismiss the case. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994), *rev. denied*, 135 Wn.2d 1010 (1998) (opposing affidavits require an evidentiary hearing on the issue of service of process).

**1. Personal Service Was Required**



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Service by means other than personal service, i.e., constructive and substitute service, "is in derogation of the common law and cannot be used when personal service is possible." *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143, 111 P.3d 271 (2005).

Personal service on Peterson was possible by means provided in RCW 4.20.080 (16): by serving "[Peterson] personally" at either his home or business addresses and also "by leaving a copy of the summons at the house of his [] usual abode with some person of suitable age and discretion then resident therein."

On November 16, 2015, Mr. Peterson was in a meeting with a technology and web design consultant, Mataio Poching, from 12:30 PM until 4:00 PM. Peterson Decl. ¶ 13. This meeting took place in Tacoma. Peterson Decl. ¶ 13. Mr. Peterson has rare occasion to be at the Subject Property during the term of a lease and was not present there at any time on November 16, 2015. Peterson Decl. ¶¶ 4; 10-13.

The Petersons could be located for the purposes of personal service with minimal means and effort. The Petersons resides at 3224 N. 31st Street in Tacoma, Washington. Peterson Decl. ¶ 2. One of the support staff at Stafne Law Firm was able to acquire this address with no more information than that which is available on the face of the *Amended Summons* and *First Amended Complaint* and access to the internet.

Mr. Peterson also maintains a business office at 3501 S. 38th Street, Suite 109 in Tacoma, Washington. Peterson Decl. ¶ 8. The Bank sends monthly statements related to the servicing of the loan on the Subject Property to this address. Peterson Decl. ¶ 8.

**2. Additional Evidence is Available**

In the event an additional hearing is required, Mr. Poching can corroborate Mr. Peterson's whereabouts when the alleged personal service of the *Amended Summons* and *First*



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*Amended Complaint* took place. Mr. Peterson may also be able to locate Rosemary Calvin and secure the testimony of regarding the fact The Petersons did not reside at the Subject Property, that his presence there would have been unlikely on any occasion during the term of her lease, and if she was present at the Subject Property on the afternoon of November 16, 2015, what, if anything, she saw.

## V. Conclusion

Because this Court never acquired jurisdiction over the person of Daniel Peterson by virtue of a failure by the Bank to comply with the requirements of relevant statutes and Court Rules, the *Order of Default and Default Judgment* is void. That order should be vacated. The *Lis Pendens* is similarly void for the same reasons. The Court should enter an Order for its cancellation. Finally, the case should be dismissed pursuant to 12(b)(2).

Dated this 4th day of February, 2016.

Respectfully submitted,

/s/ Scott E. Stafne

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## CERTIFICATE OF SERVICE

I, Linda Rodriguez, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 4th day of February, 2016, I caused to be served a true and correct copy of DEFENDANT DANIEL AND KRISTI PETERSON'S CONSOLIDATED MOTION VACATE THIS COURT'S ORDER OF DEFAULT JUDGMENT DATED JANUARY 22, 2016 AND MOTION TO DISMISS in the above title matter by causing it to be delivered to:

| | | | |
|---|---|---|---|
| Katrina E. Glogowski<br>Allegiant Law Group<br>506 2nd Ave. Floor 26<br>Seattle, WA 98104<br>Phone: 206-903-9966<br>katrina@glogowskilawfirm.com | ☐Facsimile<br>☐Express Mail<br>☑U.S. First Class Mail Postage Paid<br>☐Hand Delivery<br>☐Legal Messenger<br>☑Electronic-Email | Justin Jastrzebski<br>2001 Western Ave.<br>Suite 400<br>Seattle, WA 98121-3132 | ☐Facsimile<br>☐Express Mail<br>☑U.S. First Class Mail Postage Paid<br>☐Hand Delivery<br>☐Legal Messenger<br>☐Electronic-Email |
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DATED this 4th day of February, 2016 at Arlington, Washington.

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