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Cause No. 34988-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TIMOTHY J. EPHREM and TINA EPHREM

Appellants,

vs.

CARY FALK,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE BEVERLY GRANT

APPELLANT TINA EPHREM'S BRIEF

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred when it refused to vacate the Order of Default CP 16-17; CP 270.
2. The trial court when it entered refused to vacate its Order Deeming Admission Admitted CP 69-70; CP 270.
3. The trial court erred when it entered a judgment against Tina for attorney fees and costs. CP 348-9

Issues Pertaining to Assignments of Error

1. Should a default be vacated in the presence of conclusive defenses to plaintiff's claims?
2. Must a default order be vacated where the moving party failed to comply with the Servicemembers Civil Relief Act?
3. To the extent that any portion of an order that is based upon an Order of Default grants relief different than that which was prayed for, is that portion of the order void for lack of jurisdiction?
4. When conclusive defenses are presented, does illiteracy, lack of legal counsel and reliance upon another provide sufficient basis for "excusable neglect" to vacate a default judgment?
5. Is the plaintiff required to comply with the Homestead Act where the defendant owns the home that plaintiff seeks to have transferred to him to satisfy a debt?

6. Must an award of attorney fees be reversed where such award is based upon an attorney fee provision in a contract to which judgment debtor was not a party?
7. Should an order deeming CR 36 admissions admitted be reversed where admission would interfere with the trial court's obligation to do substantial justice rather than to decide cases upon mere technicalities?
8. Where the contract that is the basis for the action has an attorney fees clause, is a prevailing defendant entitled to an award of attorney fees even though the contract is not valid against said defendant and said defendant is not named in the contract?

B. STATEMENT OF THE CASE

This litigation is based upon a "Loan Agreement" dated January 24, 2005 (hereafter "Agreement"). CP 336. The Agreement recites that plaintiff/respondent Cary Falk (hereinafter "Falk") loaned defendant/co-appellant Timothy J. Ephrem (hereafter "Tim") the amount of \$31,000.00. The loan was to be paid back four days later with an additional \$8,000.00 "...for use of this money." CP 336. This is equivalent to an annualized interest rate of 2,354%. According to the Agreement, Tim pledged a motor home as security for the loan. The Agreement further provides that if the loan was not paid as agreed, Tim owed an additional "...100% interest per month plus all costs of collection including attorney fees, court costs and other." CP 336. For this loan, 100% interest per month equals \$372,000.00 per year (annual interest rate of 1,200%).

On September 1, 2005 Falk filed a Complaint for Money Due (hereafter "Complaint") in the Pierce County Superior Court. CP 1-8.

The Complaint inaccurately alleges Tim¹ borrowed \$39,000.00 from Falk. CP 2, para., 3.4. The correct amount is \$31,000. CP 336. The Complaint also asserts that Tim did not repay the loan by the stated due date. CP 3, para 3.8. The Complaint goes on to allege that:

In order to obtain forbearance from formal collection action following the January 28, 2005 default, Defendant Ephrem (Tim²) represented to Plaintiff Falk that Defendant Ephrem (Tim) was the holder of a lease purchase option right on residential real property at the address noted in Paragraph 1.2 and that Defendant Ephrem (Tim) would sign over and release his option to purchase said property, making Plaintiff Falk his assignee. (Reference to "Tim" added, see footnote one below for further explanation).

CP 3- 4, para. 3.11. Falk's Complaint then asserts that Tim later refused to sign over the "lease purchase option." Instead, Falk agreed to further forbear upon Tim's additional promise to deliver to Falk a "new in the box" \$25,000.00 Rolex watch. CP 4, para 3.14 – 3.15.

Regarding the "lease purchase option" and the Rolex watch, Falk's prayer for relief is very specific. Falk asked the court:

For the entry of orders requiring Defendant Ephrem to assign his interest in the lease purchase option on the residential property described in Paragraph 1.2 and for the delivery of the Rolex watch, all for liquidation and application against the aforesaid debt."

Complaint pg. 6-7, para. 6.6.

¹ Each time the Complaint uses the term "Defendant Ephrem" it is referring only to Tim and not Tina. The Complaint specifically explains that: "Unless otherwise indicated, references in this complaint to Defendant Ephrem shall be intended to mean Tim J. Ephrem." CP 2, para., 1.2.

² See footnote 1 above.

The real property that Falk claimed is the subject of the alleged agreement to assign the "lease purchase option" is located at the street address of 8502 Waller Road East, Tacoma, Pierce County, Washington 98466. CP 29.

Falk's Complaint lists both Tim and Tina as defendants. CP 1. However, there are no assertions that Tina made any promises or entered into any contract with Falk. Falk does not assert that Tina was a party to the Agreement. Indeed, Tina's name does not appear anywhere in the agreement nor did she sign the same. In fact, Falk does not make any assertion that Tina has any direct liability to him. The sole basis for Tina to be liable to Falk is Falk's assertion that a marital community liability existed between Tina and Tim. CP 1, para 1.2.

Tina is not now, nor has she ever been, married to Defendant Tim. CP 86; CP 205, ln. 1-3; CP 211, ln. 9-22; CP 248, ln. 14-17. Therefore, there is no marital community comprised of Tim and Tina. See, RCW 26.16.030 and *Sunkidd Venture, Inc. v. Snyder-Entel*, 87 Wn. App. 211, 215, 941 P.2d 16, 19 (1997).

The real property located at the above address is a home that belongs to Tina alone. She purchased her home via a Real Estate Contract. CP 89-94. Tim's name does not appear on that contract. Tina negotiated the contract with the sellers. CP 249, ln. 4-19. Tina paid the down payment from money she saved "...house cleaning, yard cleaning and baby sitting." CP 207 ln. 8-11. There is no "lease purchase option" in this home that Tim could assign to anyone. In fact, Tim does not have any interest in Tina's home. CP 89-94; CP 260, ln. 14.

Falk served the Complaint on Tina at her home on September 17, 2006. CP 14. Tina never attended school. She never learned how to read. CP 245, ln. 1-

3; CP 246 5-25; CP 247 ln. 1-3. When she received the Summons and Complaint Tina gave them to Tim. He told her he would “take care of it.” CP 251 ln. 13-23.

Like Tina, Tim cannot read or write. He did not understand the legal ramification of the pleadings that had been served upon Tina. Specifically, he did not realize that he was required to file an Answer within twenty days after service or a default could be entered against him. CP 87.

An Order of Default was entered on October 31, 2005. CP 16-17. Thereafter, on January 11, 2006 Falk served Tina with “Plaintiff’s First Requests for Admissions” addressed to both Tina and Tim. CP 48-56. Neither Tim nor Tina responded to the requests. CP 45, para 4. Due to this failure to respond the trial court entered an “Order Deeming Admissions Admitted.” CP 69-70. Based upon the default order and the “admissions,” the court entered Findings of Fact, Conclusions of Law and Judgment on March 2, 2006 (hereafter “Judgment”). CP 74-82.

Despite the fact that Tina was a stranger to the contract and Falk’s theory of Tina’s liability was based solely upon a community property theory, the Judgment provides that Tina and Tim are “jointly and severally liable” for the principal sum of \$39,000.00, \$5,102.36 in prejudgment interest, \$280.00 for costs and \$1,000.00 in attorney fees. CP 79, para 3; CP 80, para 4, 5 & 6; CP 81, para 1-4. The Judgment also provides that;

Defendants shall immediately forthwith, but no later than March 15, 2006, assign their lease purchase option on the residential property located at: 8502 Waller Road East, Tacoma, Pierce County, Washington 98446” (the complete legal description recited in the Judgment is here omitted).

CP 81, para 5. And, that: “Defendants shall forthwith, but no later than March 15, 2006, deliver the Rolex watch to Plaintiff.” CP 81, para 6.

On March 24, 2006 Attorney George Kelley appeared for both Tina and Tim. CP 83. Prior to this time neither Tina nor Tim had an attorney involved in any aspect of the case or the contract. CP 87, Para 7-8. Tens days after Mr. Kelley appeared he filed a motion on behalf of both Tim and Tina to set aside the Default Order. CP 96-102. The trial court held two hearings on this motion. The first hearing was held on April 14, 2006. RP April 14, 2006, pg. 3. At that hearing the Honorable Judge Grant initially orally ruled that the Default Order would be vacated. RP April 14, 2006, pg. 4, ln. 8-19. However, Falk objected because Tina had not supplied her own declaration testifying to her illiteracy, complete lack of involvement in the Agreement, sole ownership of the home and not being married to Tim³. RP April 13, 2006, pg. 2, ln. 11-24. After further discussion and a request by Falk, the court set the matter over to allow Falk to take Tina’s deposition. RP April 14, 2006, pg. 22, ln. 4-13.

Tina’s deposition confirmed Tim’s assertion that she was illiterate, never married to Tim, not involved in the Agreement and that she is the sole owner of the home in question. CP 243-62; CP 205-11. Nevertheless, at the second hearing on the motion to vacate the court ordered that:

“...the Defendant’s Motion to Vacate (1) the Order of Default, (2) the Order Deeming Admissions Admitted, (3) the Findings of Fact, (4) the Conclusions of Law, and (5) the Judgment is **DENIED**

³ Tim had supplied a declaration that included all of those factual assertions. CP 86-7.

CP 270-1⁴.

Thereafter, the court granted Falk an additional judgment of \$11,735.75 for attorney fees. CP 348.

On September 11, 2006, the entire monetary judgment was paid. See Exhibit I⁵. The full amount of the monetary judgment, including attorney fees and post judgment interest, was delivered to the clerk of the court on that date. The clerk has been authorized to disburse the tendered funds to Falk. See Exhibit II.

Despite the fact that the monetary judgment (including attorney fees, and post judgment interest) had been paid; irrespective of the fact that Falk's prayer for relief is limited to an order requiring "...*Defendant Ephrem* to assign *his* interest in the *lease purchase option* on the residential property..." (italic added); fully knowing that Tim did not have a lease purchase option interest in the subject property; and being wholly informed that the property belongs to Tina outright as her separate property - Falk explicably ignored the limits of his own prayer for relief and asked the trial court for an order granting him all of Tina separate ownership interest in her home. See, Exhibit III. (Plaintiff's Motion for Decree Assigning Defendant(s)' Rights to Purchase Real Property to Plaintiff).

In response Tina filled a motion asking the court to declare that the judgment had been satisfied in full. Exhibit IV. On November 3, 2006 the trial court heard both

⁴ Shortly thereafter Tina retained separate legal counsel. CP 272.

⁵ Exhibits I through V have been designated as clerk's papers from the Superior Court, but have not yet been forwarded to the Court of Appeals as of this date.

motions. Falk's motion was denied. The court then entered an "Order Confirming that the Judgments have been Fully Satisfied." Exhibit V.

For the reasons set forth below, Tina asks this court to vacate the trial court's Order of Default (CP 16-7); Order Deeming Admissions Admitted (CP 69-70); Findings of Fact, Conclusions of law and Judgment (CP 74-82); and, Order Granting Plaintiff's Motion For Attorney Fees (CP 348-9).

C. ARGUMENT

CR 55(c) (1) provides as follows:

(1) *Generally*. 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).

CR 60(b) (1) is as follows:

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) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order; ...

The Court of Appeals reviews a trial court's ruling under CR 60(b) under the abuse of discretion standard. *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 122 P.3d 922, 924 (2005). An abuse of discretion occurs whenever the trial court's decision is manifestly unreasonable or based on untenable reasons or grounds. *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Horner 151 Wash.2d 884, 894, 93 P.3d 124, 129 (2004)

Consideration of motion to vacate a default judgment is an equitable proceeding, thus equitable principles are to be applied. *Farmers Ins. Co. of Washington v. Waxman Industries, Inc.* 132 Wn. App. 142, 145, 130 P.3d 874, 876 (2006). The primary concern is that a decision on a motion to vacate a default judgment must be just and equitable. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867, 869 (2004). Indeed, in considering motions to vacate a default the trial courts have been instructed to apply their equitable authority “liberally” “...to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.” *Griggs v. Averbek Realty, Inc.* 92 Wn. 2d 576, 582, 599 P.2d 1289, 1292 (1979) (quoting *White v. Holm*, 73 Wn. 2d 348, 351, 438 P.2d 581, 584 (1968)).

Our courts have long recognized that default judgments are severe in nature as a default deprives a party the opportunity to have the case heard on the merits. “A default judgment has been described as one of the most drastic actions a court may take to punish disobedience to its commands.” *Id.* at 581. “It is the ‘policy of the law that controversies be determined on the merits rather than by default.’ ” *Soratsavong v. Haskell*, 133 Wn. App. 77, 85, n. 24, 134 P.3d 1172, 1175 (2006) (quoting *Griggs v. Averbek Realty, Inc.*, at 581). Consequently, default judgments are not favored in the law and an order vacating a default judgment is far less likely to constitute an abuse of discretion than where a court refused to set a default order aside. *Farmers Ins. Co. of Washington v. Waxman Industries, Inc.*, 132 Wn. App. 142, at 145, para 6; *Caouette v. Martinez*, 71 Wn. App. 69, 77, 856 P.2d 725 (1993); *White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968); *Griggs*, 92 Wn.2d. 582.

The considerations for a motion to vacate a default judgment are: (1) excusable neglect, (2) due diligence, plus (3) a meritorious defense, and (4) no substantial hardship

to opposing party. *Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999) (Citations omitted). The primary factors are the existence of sufficient evidence to support, at least prima facie, a defense to the claim asserted, and whether the reason for the party's failure to appear was the result of mistake, inadvertence, surprise or excusable neglect. The secondary factors are the party's diligence in asking for relief following notice of entry of default and the effect of vacating the judgment on the opposing party. *Showalter v. Wild Oats*, 124 Wn. App. at 511.

1. Should a default be vacated in the presence of conclusive defenses to plaintiff's claims?

The presence of a conclusive defense controls and is dispositive; requiring that a default be vacated irrespective of the reasons for a party's failure to appear and answer.⁶ Thus, it has been repeatedly held that: "If a strong defense on the merits exists, the court will spend scant time inquiring into the reasons which resulted in the entry of the order of default." *Hwang v. McMahon*, 103 Wn. App. 945, 950, 15 P.3d 172, 175 (2000). *Showalter v. Wild Oats*, 124 Wn. App. 512.

Tina presented a conclusive defense to Falk's Complaint. Because Tina was a stranger to the contract, Falk's only theory of liability applicable to Tina was based upon his allegation of the existence of a marital community between Tina and Tim. CP 1, para 1.2 However, Tina testified at deposition that she is not and has never been married to Tim. CP 205, ln. 20-22; CP 211, ln. 9-18; CP 248, ln. 14-17. Tim supplied the court sworn testimony that he had never been married to Tina. CP 86. This evidence was not

⁶ Trial courts may also vacate the damages portion of a default judgment even without proof that there is a meritorious defense to liability. *Soratsavong v. Haskell*, 133 Wn. App. 77, 84, 134 P.3d 1172, 1175 (2006).

refuted by Falk.⁷ Therefore, the evidence was clear that there could not be a marital community comprised of Tim and Tina. Consequently, Tina cannot be liable under Falk's marital community liability theory. See, RCW 26.16.030 and *Sunkidd Venture, Inc. v. Snyder-Entel*, 87 Wn. App. 211, 215, 941 P.2d 16, 19 (1997). For this reason alone the court disregarded well settled law and thereby abused its discretion when it denied Tina's motion to vacate the default. *Showalter v. Wild Oats*, 124 Wn. App. 512.

Falk's Complaint asserts that the assignment of the "lease purchase option" was an oral agreement between Falk and Tim. CP 3-4. However, the alleged oral promise by Tim to assign an interest in the real estate contract to Falk violates the Statute of Frauds and is therefore void. "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 64.04.010. This statute serves several purposes. The existence of a written, signed document provides strong proof that the alleged agreement was made and what specific terms the parties agreed to. Thereby, the statute helps prevent fraud that can arise from the lack of clarity inherent in oral agreements. The statute also serves a cautionary function, by bringing home the significance of the conveyance, which would tend to prevent an impulsive action. *Richardson v. Cox*, 108 Wn. App. 881, 890, 26 P.3d 970, 975 (2001). Just as the fact that the marital community did not exist, the application of the statute of frauds is a complete defense to the assignment of "lease purchase option" part of Falk's claim.

⁷ It must be remembered that: "In the procedural posture of a motion to vacate, the trial court determines whether substantial evidence exists for a prima facie defense by reviewing the moving party's evidence and reasonable inferences in the light most favorable to the movant." *Showalter v. Wild Oats*, 124 Wn. App. at 512.

Further, even if Falk could prove the existence of a marital community between Tim and Tina, Tim had no ability to assign any interest in this property without written agreement from Tina.

Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.

RCW 26.16.030(3); *Rustad v Rustad*, 61 Wn.2d 177, 179, 377 P.2d 414 (1963).

The home in question is Tina's. It is owned by her alone. Tim has no interest in this property. CP 89-95. Falk has never asserted that Tina was a party to the Agreement. His prayer for relief set forth in the Complaint does not seek to grant Falk any of Tina's separate ownership interest in her home. CP 6-7. Therefore, even assuming that Tim's debt to Falk created a "community liability," the debt is enforceable only against the community property and not Tina's separate property. *Sunkidd Venture, Inc. v. Snyder-Entel*, 87 Wn. App. 211, 216, 941 P.2d 16, 9 (1997). Thus, Tina has a complete defense to any assertion that Falk acquired an interest in Tina's home.

Further, Tina has established complete defense to Falk assertion that he was entitled to an assignment of a "lease purchase option" interest in her home because no such option exists. Tina purchased the subject property pursuant to a real estate contract. CP 89-95. As a purchaser under a real estate contract Tina owns the land. The contract vendor holds the title in trust and only retains a security interest. See *Committee of Protesting Citizens, Thorndyke Area v. Val Vue Sewer Dist.* 14 Wn. App. 838, 840-1, 545 P.2d 42, 43-4 (1976).

A real estate contract is not a “lease purchase option.” A lease is: “Any agreement which gives rise to relationship of landlord and tenant (real property) or lessor and lessee. Contract for the exclusive possession of lands or tenements for determinate period.” Black’s Law Dictionary 800 (5th ed. 1979). An “option to purchase” is:

A bilateral contract in which one party is given the right to buy the property within a period of time for a consideration paid to the seller. A right acquired by contract to accept or reject a present offer within a limited or reasonable time and is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time.

Black’s law Dictionary 987 (5th ed. 1979).

In contrast, a “real estate contract” is defined by statute as: “... any written agreement for the sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price. "Contract" or "real estate contract" does not include earnest money agreements and options to purchase.” RCW 61.30.010 (1).

Certainly, Tina does not have, and cannot have, a “lease purchase option” on property she owns. Such a concept defies both common sense and the merger doctrine. See *Schlager v. Bellport*, 118 Wn. App. 536, 76 P.3d 778 (2003) and *Radovich v. Nuzhat*, 104 Wn. App. 800, 16 P.3d 687 (2001). Consequently, Tina has a complete defense to the Falk’s allegation of an assignment of a “lease purchase option” because no such interest exists.

Falk asked the court for an equitable remedy.⁸ Here, the original loan was in the amount of \$31,000.00. CP 386. The monetary judgment of the court was a little over \$60,000.00 (including post judgment attorney fees, costs and post judgment interest). Falk values Tina's house at approximately \$800,000.00 – well over ten times the judgment debt. See Exhibit III.

A similar situation occurred in the case of *Malo v. Anderson*, 62 Wn.2d 813, 815, 384 P.2d 867, 869 (1963). In *Malo* the defendant was \$245 in arrears in monthly payments on a \$2,000.00 judgment debt. Based on this arrearage, the plaintiff acquired title to the defendant's home valued at \$6,000.00 via execution and sheriff's deed. The trial court confirmed the sale. *Id.* at 814. The Supreme Court reversed.

In reversing, the Supreme Court held that a creditor is, of course, entitled to have a judgment satisfied. However, where the value of the property is greatly in excess of the monetary judgment:

To decree the lands absolute in the complainant would create a situation quite as iniquitous and oppressive and as obnoxious to a court of conscience as that arising out of the fraudulent conduct of the defendants. Satisfaction of the debt and not pillage of the debtor's estate is equity's relief.

Id. at 817 quoting *Bourgeois v. Risley Real Estate Co.* 82 N.J. Eq. 211, 214, 88 A. 199, 201 (1913). Thus, the *Malo* court held that equity would not allow the forfeiture of the debtor's valuable home noting that "one who seeks equity must do equity." *Id.* at 817.

Here Falk asked the trial court to order that all of Tina's ownership interest in her home be forfeited to him. However, it has long been the law of this state that

⁸ Equitable relief is defined as: "That species of relief sought in a court with equity powers as, for example in the case of one seeking an injunction or specific performance instead of money damages." Black's Law Dictionary 484 (5th ed. 1979)

“...forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.” *Ryker v. Stidham*, 17 Wn. App. 83, 89, 561 P.2d 1103 (1977). Falk does not have a “right” to Tina’s home “so clear as to permit no denial” of a transfer of her ownership interest to him. In fact Mr. Falk has absolutely no rights in Tina’s home. His contract was with Tim. Tina had absolutely nothing to do with the debt. The home in question is hers alone, not Tim’s. Tim had no authority to grant Falk an interest in Tina’s home.

Falk is not “doing equity.” Instead, Falk seeks to displace Tina while “pillaging” her estate. Granting the relief Falk prayed for would result in an “iniquitous and oppressive” and “obnoxious” order that “a court of conscience” would equate to fraud. *Malo v. Anderson*, 62 Wn.2d at 817.

Thus, again, Tina has a persuasive, if not conclusive, defense.

The alleged Agreement and alleged oral modification to assign the real estate contract and the Rolex watch to Plaintiff are substantively unconscionable. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 355-56, 103 P.3d 772 (2005). The question of whether a contract is unconscionable a question of law for the court. *Nelson v. McGoldrick*, 127 Wn. 2d 124, 131, 896 P.2d 1258, 1262 (1995).

“Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh, while procedural unconscionability relates to impropriety during the process of forming a contract.” *Schroeder v. Fageol Motors, Inc.* 86 Wn.2d 256, 260, 544 P.2d 20, 23 (1975). “An unconscionable bargain or contract is one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other.” *Montgomery Ward & Co., Inc. v. Annuity Bd. of Southern Baptist Convention*, 16 Wn. App. 439, 444, 556 P.2d 552, 555 (1976) (quoting from Black’s Law Dictionary (4th ed. 1951)). The

terms “[s]hocking to the conscience” “monstrously harsh” and “exceedingly calloused” are used to define unconscionability. *Id.* at 444.

Here the written Agreement is for a secured four day loan with an annualized interest rate of 2,354%. Upon default the Agreement provides 100% interest per month plus all costs of collection including attorney fees, court costs and other. CP 336. As the result of an alleged oral forbearance agreement (of an unstated length of time) Falk claimed he is entitled to all Tina’s interest in her home that Falk values at \$800,000.00 and a \$25,000.00 Rolex watch. Falk claims all this bounty based on Tim’s breach of a \$31,000.00 four day loan. These terms surly are “shocking to the conscience” “monstrously harsh” and “exceedingly calloused.” Therefore, Tina has a compelling defense that the contract should not be enforced as it is unconscionable.

2. Must a default order be vacated where the moving party failed to comply with the Servicemembers Civil Relief Act?

In order to protect men and women servicing the country, the U.S. congress has set minimum requirements prior to the entry of any default order in any court in the United States⁹. 50 USC§ 521 provides:

Protection of servicemembers against default judgments.

(a) Applicability of section.

⁹ 50 USCA § 512. Jurisdiction and applicability of Act.

(a) Jurisdiction

This Act [sections 501 to 596 of this Appendix] applies to--

- (1) the United States;
- (2) *each of the States, including the political subdivisions thereof*; and
- (3) all territory subject to the jurisdiction of the United States.

(b) Applicability to proceedings

This Act [sections 501 to 596 of this Appendix] applies to any judicial or administrative proceeding commenced *in any court* or agency in any jurisdiction subject to this Act [said sections]. This Act [said sections] does not apply to criminal proceedings.

This section applies to any civil action or proceeding in which the defendant does not make an appearance.

(b) Affidavit requirement.

(1) Plaintiff to file affidavit

In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit--

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

(2) Appointment of attorney to represent defendant in military service

If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

(3) Defendant's military status not ascertained by affidavit

If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act [sections 501 to 596 of this Appendix].

Tina is not and has never been a person servicing in the U.S. military. However, Congress was clear that the determination of whether or not the defendant is in military service is a prerequisite to be made before a default order is entered. Clearly, it is the

intent of the statute that this determination be made in all cases in order to reduce the possibility of a default order being entered against a person serving in the military. *But cf. Lyle v. Haskins*, 24 Wn.2d 883, 902, 168 P.2d 797, 808 (1946) (holding that under the former Soldiers' and Sailors' Civil Relief Act of 1940 default orders that were entered without complying with the provisions of that act were not void, but only voidable at the instance of a serviceman).

Falk failed to comply with the mandatory requirements of 50 USC § 521.

Therefore the default must be vacated.

3. To the extent that any portion of an order that is based upon an Order of Default grants relief different than that which was prayed for, is that portion of the order void for lack of jurisdiction?

It is well established fundamental law that the court cannot award Falk any relief that exceeds or is different than what was prayed for in his Complaint. CR 54 provides:

(c) Demand for Judgment. *A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.* Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. (Italic added.)

In fact, the court does not have jurisdiction to grant any judgment that is different than the relief Falk prayed for in his Complaint. Any such award is void for lack of due process.

When a judgment or decree is entered by default, it ‘shall not be different in kind from or exceed the amount that [was] prayed for in the demand for judgment.’ Indeed, “a court has no jurisdiction to grant relief beyond that sought in the complaint.”

In re Marriage of Hughes, 128 Wn. App. 650, 658, 116 P.3d 1042, 1046 (2005) quoting”
In re Marriage of Johnson, 107 Wn. App. 500, 503-4, 27 P.3d 654 (2001), CR 54(c) and
Matter of Marriage of Leslie, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989).

And, “...a default judgment cannot award any relief beyond that which the facts alleged in the complaint in the action show the plaintiff legally entitled to.” *State ex rel. Adams v. Superior Court of State, Pierce County*, 36 Wn.2d 868, 872, 220 P.2d 1081, 1084 (1950).

The default judgment here provides that Tina and Tim are “jointly and severally liable” for the principal sum of \$39,000.00, \$5,102.36 in prejudgment interest, \$280.00 for costs and \$1,000.00 in attorney fees. CP 79, para 3; CP 80, para 4, 5 & 6; CP 81, para 1-4.

“Several liability” is defined as: “Liability separate and distinct from liability of another to the extent that an independent action may be brought without joinder of others.” *Blacks Law Dictionary* 1232 (5th ed. 1979). “Severally” means “distinctly, separately, apart from others. When applied to a number of persons the expression *severally liable* usually implies that each one is liable alone.” *Id*, pg 1232.

Falk did not pray for “joint and several” liability. CP 6-7. There are no facts alleged in the Complaint that support a finding that Tina has any separate liability for the agreements (written or oral) that Tim entered into with Falk. The only theory of liability Falk advanced against Tina was based upon the assertion that a marital community existed between Tina and Tim. CP 1.

Consequently, the “joint and several” judgment(s) of the court must be reversed as there are no facts asserted to support such a judgment and the relief granted exceeds, or is different than what Falk prayed for.

In paragraph 6.6 Falk’s prayer for relief states:

For the entry of orders requiring *Defendant Ephrem* [Tim] to assign *his* interest in the *lease purchase option* on the residential property described in Paragraph 1.2 and for the delivery of the Rolex watch, *all for the liquidation and application against the aforesaid debt.*” CP 6-7. (Italic added).

Thus, Falk only requested that the “lease purchase option” be “liquidated” to pay off the debt. However, the default judgment, in relevant part, orders:

Defendants shall immediately forthwith, but no later than March 15, 2006, assign their *lease purchase option* on the residential property located at: 8502 Waller Road East, Tacoma, Pierce County, Washington 98446” CP 81, pg. 8, para. 5. (Italic added).

On its face, the judgment exceeds and is different than the prayer for relief as the default judgment requires the transfer of the interest in Tina’s home irrespective of the full payment of the debt. Again, to the extent that a default order exceeds what was prayed for, the order is void. *In re Marriage of Hughes*, 128 Wn. App. at 658.¹⁰

¹⁰ After payment of the entire monetary judgment and without Tina transferring any interest in her home to Falk, the trial court entered its “Order Confirming that the Judgments have been Fully Satisfied.” Exhibit V. Thus, the order to transfer the “lease purchase option” in issue may be mute. *In re Detention of V.B.*, 104 Wn. App. 953, 959, 19 P.3d 1062, 1065 (2001).

4. When conclusive defenses are presented does illiteracy, lack of legal counsel and reliance upon another provide sufficient basis for excusable neglect to vacate a default judgment?

Tina cannot read or write English. When she received the pleadings Tina relied on Tim who told her he would take care of the problem. Tim is also illiterate. Neither, Tina or Tim retained counsel until after the default judgment was entered.

The inability to understand pleadings is a factor to be considered in vacating an order of default. *Spoar v Spokane Turn Verein*, 64 Wn. 208, 212, 116 P. 627 (1911); *Calhoun v. Merritt*, 46 Wn. App. 616, 618, 731 P.2d 1094, 1095 (1986). Absence of legal counsel is another. *James Mfg. Co. v. Stovner*, 1 Wn. App. 27, 29, 459 P.2d 51, 53 (1969). Reliance upon another who neglects to properly respond to a complaint has also been held to be a consideration for excusable neglect as well. *Topliff v. Chicago Ins. Co.* 130 Wn. App. 301 122 P.3d 922, 925 (2005) *review denied* 157 Wash.2d 1018, 142 P.3d 608 (2006) (insurance commissioner failed to forward pleadings to defendant insurance company); *Barr v. MacGugan* 119 Wn. App. 43, 47, 78 P.3d 660, 662 (2003) (gross negligence of attorney).

5. Is the plaintiff required to comply with the Homestead Act where the defendant owns the home that plaintiff seeks to have transferred to him to satisfy a debt?

Falk's prayer for relief is directly contrary to and ignores the statutory protections of the Homestead Act. RCW 6.13.030. Tina's interest in her property is automatically protected by the homestead exemption described in RCW 6.13.070 from and after the time she occupied it as a principal residence. RCW 6.13.040. Notably, under the statute,

an “owner” includes but is not limited to “a purchaser under a deed of trust, mortgage, or *real estate contract*.” RCW 6.13.010(2). (Italic added.)

6. Must an award of attorney fees be reversed where such award is based upon an attorney fee provision in a contract to which judgment debtor was not a party?

The court granted Falk a judgment of \$11,735.75 against Tina and Tim for attorney fees. CP 348.

“Attorney fees and costs are permitted *only* if based on a statutory, contractual, or equitable ground.” *Colwell v. Etzell*, 119 Wn. App. 432, 442, 81 P.3d 895, 900 (2003) (italic added) citing, *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 160, 60 P.3d 53 (2002); *King County v. Squire Inv. Co.*, 59 Wn. App. 888, 896, 801 P.2d 1022 (1990) see also, RCW 4.84.185.

Here, the contract that is the subject matter of this lawsuit, provided: “Should TE [Tim] fail to pay CF [Falk] as agreed, TE agrees to pay CF 100% interest per month plus all costs of collection including attorney fees, court costs, and other.” CP 336. However, the only parties to that agreement are Falk and Tim. Tina is not mentioned in that contract nor does her signature appear anywhere on the document.

Because Tina is a stranger to the contract, she cannot be held liable for attorney fees based upon the same. *Watkins v. Restorative Care Center, Inc.*, 66 Wn. App. 178, 196 (1992). Any award of attorney fees based upon contract should be entered solely against the non-prevailing party to the contract, Tim.

Although Tina was not a party to the contract, Falk’s complaint asserted that Tina and the marital community comprised of Tim and Tina were liable for Timothy’s contractual obligations. Presumably, Plaintiff’s liability here is based upon concepts of community property.

Community property is defined by statute as property acquired after marriage by either husband or wife or both. RCW 26.16.030 provides:

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage by either husband or wife or both, is community property. Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property, except:

See, *Sunkidd Venture, Inc. v. Snyder-Entel*, 87 Wn. App. 211, 215, 941 P.2d 16, 19 (1997).

However, it is undisputed that Tina has never been married to Tim. Consequently, there is no marital community between them. Therefore, there is no RCW 26.16.030 community property before the court. Subsequently, neither Tina nor her property can be held liable for Tim's contractual attorney fees obligation.

7. Should an order deeming CR 36 admission admitted be reversed where admission would interfere with the trial court's obligation to do substantial justice rather than to decide cases upon mere technicalities?

After the default order was entered, Falk served Tina with "Plaintiff's First Requests for Admissions" addressed to both Tina and Tim. CP 48-56. Tina gave the document to Tim again with the understanding that he would take care of the matter. Neither Tim nor Tina responded to the requests. CP 45, para 4. The trial court then entered an "Order Deeming Admissions Admitted." CP 69-70. Tina asks to have this decision reversed.

Requests for admissions are governed by CR 36. However, admissions must be evaluated with respect to the purposes behind the rule, the matters in dispute and the

surrounding circumstances. The Civil Rules must be used to promote and not to obstruct the administration of justice. Therefore, CR 36 must be applied to enable the Court to do substantial justice rather than to decide cases upon mere technicalities. Consequently, on remand the admissions here should not be taken as controlling because the ultimate decision should not be based on mere matters of pleadings or technical admission.

Coleman v. Altman, 7 Wn. App. 80, 85-86, 497 P.2d 1338 (1972) (citation omitted), (relying on *Voisin v. Luke*, 191 So.2d 503 (1966)).

8. Where the contract that is the basis for the action has an attorney fees clause, is a prevailing defendant entitled to award of attorney fees even though the contract is not valid against said defendant and said defendant is not named in the contract?

In compliance with RAP 18.1, Tina respectfully requests that this court award her attorney fees she has incurred pursuing this appeal.

Falk has asserted a claim against Tina pursuant to the Agreement and asked for an award of attorney fees relying on the terms of that contract. CP 6; CP 336. For the reasons set forth above, the Agreement is not enforceable against Tina as she is neither a party to that contract nor married to Tim. Nevertheless she is entitled to an award of her attorney fees.

Here Falk's action is based on a contract containing an attorney fee clause. CP 336. RCW 4.84.330 entitles the prevailing party to a fee award. This is not a matter of court discretion. The statute provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, *the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to*

reasonable attorney's fees in addition to costs and necessary disbursements. RCW 4.84.330 (*Italic added*).

The prevailing party is entitled to fees even if the contract is invalidated. *Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. 143, 155, 135 P.3d 547, 553 (2006). Thus, pursuant to RCW 4.84.330 Tina is entitled to an award of attorney fees even though she is not named in the contract and it cannot be enforced against her.

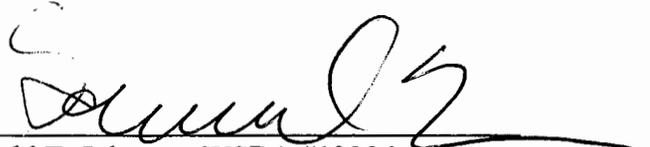
D. CONCLUSION

For the reasons set forth above it is respectfully submitted that the default order and judgment against Tina must be vacated, the Order Deeming Admissions Admitted should be reversed and that Tina be relieved of any order to pay Falk's attorney fees. Finally, Tina asks the court for an award of her attorney fees and costs incurred in processing this appeal.

RESPECTFULLY SUBMITTED this 17 day of

November, 2006.

MANN, JOHNSON, WOOSTER
& MCLAUGHLIN, P.S.



Garold E. Johnson, WSBA #13286
Attorneys for Appellant Tina Ephrem

EXHIBIT I

Ephren

PIERCE COUNTY SUPERIOR COURT
TACOMA WA
KEVIN STOCK
CLERK OF THE SUPERIOR COURT

Rcpt. Date: 09/11/2006
Acct. Date: 09/11/2006
Receipt #: 2006-01-12653
Cashier ID: MLH
Time: 03:09 PM

Item	Case Number	Amount
01 3150: Trust-Tender \$TRT SGB	05-2-11420-2	\$20,000.00
Total Due:		\$20,000.00
Check Tendered:		\$20,000.00
Change Due:		\$0.00

Paid By: HANN, JOHNSON, WOOSTER, -

PIERCE COUNTY SUPERIOR COURT
TACOMA WA
KEVIN STOCK
CLERK OF THE SUPERIOR COURT

Rcpt. Date: 09/11/2006
Acct. Date: 09/11/2006
Receipt #: 2006-01-12654
Cashier ID: MLH
Time: 03:09 PM

Item	Case Number	Amount
01 3150: Trust-Tender \$TRT SGB	05-2-11420-2	\$40,113.41
Total Due:		\$40,113.41
Check Tendered:		\$40,113.41
Change Due:		\$0.00

Paid By: KELLEY, GEORGE ATTY AT LAW

Exhibit I

EXHIBIT II

RECEIVED
SEP 14 2006
DAVIES PEARSON, P.C.

FILED
IN COUNTY CLERK'S OFFICE
A.M. SEP 14 2006 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

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

CARY FALK,

Plaintiff,

vs.

TIMOTHY J. EPHREM and TINA
EPHREM,

Defendant.

) Cause No.: 05-2-11420-2
) Judgment No.: 06-9-02849-1

) DEFENDANTS' AUTHORIZATION TO
) RELEASE FUNDS IN REGISTRY OF
) THE COURT

) (Clerk's Action Required)

TO: PIERCE COUNTY SUPERIOR COURT CLERK;

AND TO: CARY FALK

AND TO: NATHAN NEIMAN and EDWARD WINSKILL, his attorneys

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that Timothy J. Ephrem, by and through his attorney of record, George S. Kelley and Tina Ephrem, by and through her attorney of record, Garold E. Johnson of Mann, Johnson, Wooster & McLaughlin, P.S., hereby authorizes the Pierce County Superior Court Clerk to release funds currently held in the registry of the court to satisfy the monetary judgment entered herein on March 2, 2006.

COPY

1 Defendants further request that the Pierce County Clerk comply with RCW 4.56.100
2 by noting upon the record in the execution docket satisfaction thereof giving the date of
3 satisfaction.

4 Pursuant to RCW 4.56.100(1) the defendants provide the following information:

5 The Judgment creditor is: Cary Falk

6 The attorneys for the judgment creditor are: Edward Winskill and Nathan
7 Neiman.

8 The judgment debtors are: Timothy Ephrem and Tina Ephrem.

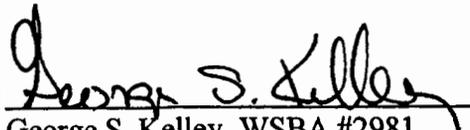
9 The amount of satisfaction paid is: \$60,113.41

10 Judgment date: March 02, 2006.

11 The satisfaction is the full amount of the monetary award of the Court including
12 attorney fees and costs and post judgment interest calculated from the date of the award
13 through September 11, 2006.

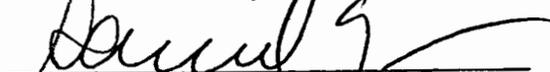
14 DATED at Tacoma, Washington this 14 day of September, 2006.

15 GEORGE S. KELLEY

16 

17 George S. Kelley, WSBA #2981
18 Attorney for Timothy Ephrem

MANN, JOHNSON, WOOSTER
& MCLAUGHLIN, P.S.

19 

20 Garold E. Johnson, WSBA # 13286
21 Attorney for Tina Ephrem

LAW OFFICES OF

MANN, JOHNSON, WOOSTER & McLAUGHLIN, P.S.

EARL D. MANN (1908-1995)
GAROLD E. JOHNSON*
RICHARD H. WOOSTER
ROBERT J. McLAUGHLIN*
*ALSO ADMITTED IN ALASKA

820 'A' STREET, SUITE 550
TACOMA, WASHINGTON 98402
TACOMA 253/572-4161
SEATTLE 253/838-1154
FACSIMILE 253/572-4167

September 14, 2006

FACSIMILE TRANSMITTAL

TO: George Kelley

COMPANY:

FAX NUMBER: 572-6662

FROM: Chris

RE: Ephrem

NO. OF PAGES: 3

ITEMS SENT: Conformed copy of Authorization form

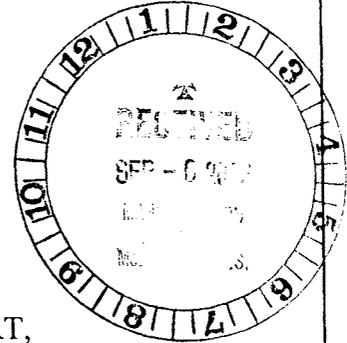
COMMENTS:

CONFIDENTIALITY NOTICE

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EXHIBIT III

The Honorable Beverly Grant
Hearing Date: September 15, 2006
Hearing Time: 9:00 AM
With Oral Argument



IN THE PIERCE COUNTY SUPERIOR COURT,
THE STATE OF WASHINGTON

20	CARY FALK, a single man,)	Case No.: 05-2-11420-2
21)	
22	Plaintiff,)	MOTION FOR DECREE ASSIGNING
23	vs.)	DEFENDANT(S)' RIGHTS TO
24)	PURCHASE REAL PROPERTY TO
25)	PLAINTIFF
26	TIMOTHY J. EPHREM and TINA EPHREM,)	
27	husband and wife, and the marital community))	
28	composed thereof,)	
29)	
30	Defendants.)	
31)	

I. RELIEF REQUESTED

Because Defendants Timothy and Tina Ephrem have persisted in their failure to comply with the Court's March 2, 2006 Order commanding that the Defendants assign the rights possessed by the Defendants, or either of them, to purchase certain Property to Plaintiff Cary Falk, Plaintiff Cary Falk respectfully moves this Court for a decree/order assigning the rights possessed by the Defendants, or either of them, to purchase certain real estate commonly known as 8502 Waller Road East, Tacoma, Pierce County, Washington 98446 to Plaintiff Falk, a single man.

**MOTION FOR DECREE ASSIGNING
DEFENDANT(S)' RIGHTS TO
PURCHASE REAL PROPERTY TO
PLAINTIFF - 1**

LAW OFFICES
NATHAN JAMES NEIMAN
2018 - 156th Avenue Northeast
Bellevue, Washington 98007
PHONE: (425) 881-3680 · FAX (425) 881-1457

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II. NATURE OF THE CASE

The Defendants, **Timothy and Tina Ephrem**, have once again ignored our judicial system, the law, and the clear mandates of this Court. In this case, the Defendant disregarded the judicial process served on them, paid no attention to the repeated notices concerning this lawsuit, and allowed this matter to be decided by default. Thereafter, they continued in their disrespect for the Court by ignoring the clear deadlines imposed in the Court's orders.

When Plaintiff Falk took steps to enforce the orders, the Defendants sought relief from the Court and attempted to set those orders aside. When the Defendants did not receive the relief that they requested, they continued in their flagrant disregard.

III. STATEMENT OF FACTS

After due notice to the Defendants Ephrem, this Court entered Findings of Fact, Conclusions of Law and Judgment against the Defendants. In its order, this Court stated, "Defendants shall immediately forthwith, but no later than March 15, 2006, assign their lease purchase option on the residential property located at: 8502 Waller Road East, Tacoma, Pierce County, Washington 98446 and legally described as follows:

LOT 2, PIERCE COUNTY SHORT PLAT NUMBER 9109270730, RECORDED SEPTEMBER 27, 1991, IN PIERCE COUNTY, WASHINGTON; EXCEPT THAT PORTION CONVEYED TO PIERCE COUNTY BY INSTRUMENT RECORDED UNDER RECORDING NUMBER 9110100394 FOR ADDITIONAL RIGHT OF WAY FOR 84TH STREET EAST AND WALLER ROAD[.]¹

A true and correct copy of the Findings of Fact, Conclusions of Law and Judgment are attached to the Declaration of Frohlich as Exhibit A.

On March 3, 2006, via express mail, Plaintiff's counsel sent a certified copy of this Court's Findings of Fact, Conclusions of Law and Judgment to the Defendants along with a letter

¹ Declaration of Frohlich, Ex.A.

1 requesting that Defendants make arrangements with Plaintiff's counsel to assign their interest in
2
3 the subject real property by the March 15, 2006 deadline.² A true and correct copy of the Letter
4
5 to Defendants dated March 3, 2006 is attached to the Declaration of Frohlich as Exhibit B.
6

7
8 The Court's March 15, 2006 deadline passed and the Defendants failed to assign the
9
10 rights possessed by either of them to purchase the subject Property.³ After the Order was entered,
11
12 Plaintiff's counsel was finally able to obtain the document vesting the Defendant Tina Ephrem
13
14 with rights to purchase the subject Property from Mr. Granville Brinkman.⁴ A true and correct
15
16 copy of the document vest Defendant Tina Ephrem with such right to purchase the Property is
17
18 attached to the Declaration of Frohlich as Exhibit C.
19

20
21 On April 3, 2006, Defendants moved to (1) vacate the Court's Order of Default; (2) to
22
23 vacate the Court's Order Deeming Admissions Admitted; (3) to vacate the Court's Findings of
24
25 Fact; (4) the Court's Conclusions of Law; and finally (5) to vacate the Court's Judgment to
26
27 Plaintiff.
28

29
30 On May 19, 2006, the Defendants' motion for vacation was **DENIED** in its entirety. All
31
32 relief previously granted by this Court to Plaintiff Falk was upheld. Despite this Court's Orders
33
34 upholding the relief, Defendants Ephrem persisted in their omission or refusal to assign any right
35
36 to purchase the Property possessed by the Defendants, or either of them, to Plaintiff Cary Falk.
37

38
39 To enforce the Judgment previously entered, the Court should judicially decree that: All
40
41 of Defendant Tina Ephrem's right in the above identified Property **IS**, by Order of the Court,
42
43 assigned to Plaintiff Falk.
44

45 IV. STATEMENT OF ISSUES

46
47 1. Should the Court judicially decree that the Real Estate Contract **IS** assigned to Plaintiff
48

49 ² Declaration of Frohlich, ¶4.

50 ³ Declaration of Frohlich, ¶5.

⁴ Declaration of Frohlich, ¶6.

1 Falk where the Defendants have willfully refused to comply with the Order of this this Court?
2
3

4 **V. EVIDENCE RELIED UPON**
5

- 6 1. Declaration of Daniel J. Frohlich; and
7
8 2. The records and files herein.
9

10
11 **VI. LEGAL AUTHORITY AND DISCUSSION**
12

13 This motion requests that the Court's exercise its inherent power to enforce its decrees
14 and to make such orders as are necessary to render them effective. See Ronken v. Board of
15 County Com'rs of Snohomish County, 89 Wn.2d 304, 572 P.2d 1 (1977).⁵ The relief awarded
16
17 by this Court to the Plaintiff on March 2, 2006 was an order requiring specific performance.
18
19

20
21 **1. Underlying Action**
22

23 In the underlying action, this Court entered Findings that Defendants' breached their
24 contract with the Plaintiff.⁶ The Court ordered that, "Defendants shall immediately forthwith,
25
26 but no later than March 15, 2006, assign their lease purchase option on the residential property
27
28 located at: 8502 Waller Road East, Tacoma, Pierce County, Washington 98446 and legally
29
30 described as follows:
31
32

33
34 LOT 2, PIERCE COUNTY SHORT PLAT NUMBER 9109270730, RECORDED
35 SEPTEMBER 27, 1991, IN PIERCE COUNTY, WASHINGTON; EXCEPT
36 THAT PORTION CONVEYED TO PIERCE COUNTY BY INSTRUMENT
37 RECORDED UNDER RECORDING NUMBER 9110100394 FOR
38 ADDITIONAL RIGHT OF WAY FOR 84TH STREET EAST AND WALLER
39 ROAD[.]"
40
41

42
43 There is no dispute as to what was ordered by this Court. There is no ambiguity regarding
44
45 the timeframe with which the Court gave the Defendants to accomplish the assignment of their
46
47

48 ⁵ See also Motions, Rules and Orders, 56 Am.Jur.2d §55: "[A] court has inherent judicial authority to enforce its
49 own orders, and may compel compliance with them or issue appropriate additional orders to make the granted relief
50 effective."

⁶ See March 2, 2006 Finding of Fact #23, Conclusion of Law #7 and Judgment at ¶5.

1 interest in the real property. Instead of complying with the Court's order, the Defendants moved
2
3 to vacate the Order. The motion was filed after the deadline the Court set for compliance. When
4
5 the Defendants' motion for vacation was DENIED, Defendants Ephrem then chose to
6
7 deliberately disregard the Court's Order by willfully failing to assign their interest.
8

9
10 Pursuant to its inherent power, a decree should enter assigning all the rights (of any
11
12 nature) to purchase the Property possessed by the Defendants, or either of them, to Plaintiff Cary
13
14 Falk.

15
16 **2. Supersedeas Bond**
17

18 Although the Defendants have appealed the orders entered in this case, the Defendants
19
20 have not brought any motion requesting that this Court set the amount, terms and conditions of a
21
22 supersedeas bond to stay enforcement of the Court's order of assignment of the Defendants'
23
24 rights to purchase the Property. RAP 8.1(b) provides in pertinent part:

25
26
27 A trial court decision may be enforced pending appeal or review **unless stayed**
28
29 pursuant to the provisions of this rule. Any party to a review proceeding has the
30
31 right to stay enforcement of a money judgment, or a decision affecting real,
32
33 personal or intellectual property, pending review. Stay of a decision in other civil
34
35 cases is a matter of discretion.
36
37 . . .

38 (2) Decision Affecting Property. Except where prohibited by statute, **a party may**
39
40 **obtain a stay of enforcement of a decision affecting rights to possession,**
41
42 **ownership or use of real property, or of tangible personal property, or of**
43
44 **intangible personal property, by filing in the trial court a supersedeas bond**
45
46 **or cash,** or by alternate security approved by the trial court pursuant to subsection
47
48 (4), below. If the decision affects the rights to possession, ownership or use of a
49
50 trademark, trade secret, patent, or other intellectual property, a party may obtain a
stay in the trial court only if it is reasonably possible to quantify the loss which
would be incurred by the prevailing party in the trial court as a result of the party's
inability to enforce the decision during review.

[Emphasis Added]

The Defendants have not sought any order staying enforcement of the Court's

1 decision. Despite the Defendants' appeal, the rules clearly provide that Plaintiff Falk may
2
3 seek enforcement of the Court's order concerning the assignment of any right possessed
4
5 by either Defendant to purchase the Property.
6

7 If the Defendants attempt, at this late stage, to move for the setting of a bond to
8
9 stay enforcement, then RAP 8.1(c)(2) requires that the supersedeas bond be sufficient to
10
11 cover the reasonable value of the use of the property during review. RAP 8.1(c)(2)
12
13 provides in pertinent part:
14

15
16 The supersedeas amount shall be the amount of any money judgment, plus
17 interest likely to accrue during the pendency of the appeal and attorney fees,
18 costs, and expenses likely to be awarded on appeal entered by the trial court
19 plus the amount of the loss which the prevailing party in the trial court would
20 incur as a result of the party's inability to enforce the judgment during
21 review. Ordinarily, the amount of loss will be equal to the reasonable value of
22 the use of the property during review. A party claiming that the reasonable
23 value of the use of the property is inadequate to secure the loss which the party
24 may suffer as a result of the party's inability to enforce the judgment shall have the
25 burden of proving that the amount of loss would be more than the reasonable
26 value of the use of the property during review. If the property at issue has value,
27 the property itself may fully or partially secure any loss and the court may
28 determine that no additional security need be filed or may reduce the supersedeas
29 amount accordingly.
30
31

32
33 [Emphasis Added]
34

35 In this case, the reasonable value of the lost use of the Property pending review on
36
37 appeal will be significant. Upon information and belief, the value of the property is
38
39 believed to be approximately \$800,000.00. The Plaintiff has incurred thousands of
40
41 dollars in attorney's fees and costs pursuing this matter to date, and it likely to incur tens
42
43 of thousands more when this matter is fully reviewed on appeal. If the Defendants seek to
44
45 stay enforcement of the judgment and request that this Court set the amount and terms of
46
47 the supersedeas bond must be sufficient to cover:
48
49
50

EXHIBIT IV

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RECEIVED
OCT 05 2006
DAVIES PEARSON, P.C.

FILED
IN COUNTY CLERK'S OFFICE
THE HONORABLE BEVERLY GRANT
Hearing Date October 13, 2006, 9:00 a.m.
OCT 9 2006 P.M.

RECEIVED
OCT 05 REC'D
George S. Kelley

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY DEPUTY

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

CARY FALK, a single man,
Plaintiff,
vs.
TIMOTHY J. EPHREM and TINA EPHREM,
husband and wife, and the marital community
composed thereof,
Defendant.

) Cause No.: 05-2-11420-2
)
) **MOTION FOR ORDER CONFIRMING**
) **THAT THE JUDGMENTS HEREIN**
) **HAVE BEEN FULLY SATISFIED**

I. RELIEF REQUESTED

COMES NOW defendant, Tina Ephrem, by and through her attorney of record Garold E. Johnson of Mann, Johnson, Wooster & McLaughlin, P.S., and respectfully moves this Court for an Order confirming that the judgment entered on March 2, 2006 and the Order Granting Plaintiff's Motion for Attorney Fees filed herein on August 11, 2006 have been, and are hereby declared, fully satisfied.

II. FACTS

Following a default order, on March 2, 2006 the Court entered Findings of Fact, Conclusions of Law and Judgment (hereafter referred to as "Findings"). The Findings awarded

MOTION FOR ORDER DECLARING JUDGMENT
SATISFIED - Page 1

Law Offices of
Mann, Johnson, Wooster & McLaughlin, P.S.
820 A STREET, SUITE 550
TACOMA, WASHINGTON 98402
(253) 572-4161 Tacoma
(253) 838-1154 Seattle
(253) 572-4167 Facsimile

COPY

1 Mr. Falk \$39,000.00 as a principal judgment, \$5,102.39 in prejudgment interest, \$280.00 in court
2 costs and \$1,000.00 in attorney fees. Thus, the total amount awarded at the time of judgment
3 was \$45,382.39.

4 After the Findings were entered the Court ordered an additional award of attorney fees in
5 the amount of \$11,735.73. See Order Granting Plaintiff's Motion for Attorney Fees dated
6 August 11, 2006.

7 The defendants have paid the entire monetary judgment in the total sum of \$60,113.41.
8 See Exhibit 1. This is the full amount of the monetary judgments entered herein, including
9 attorney fees and post judgment interest. Post judgment interest in the amount of \$2,995.29 was
10 calculated from the dates of the judgments until the day the sums were tendered to the clerk of
11 the court on September 11, 2006.

12 The only other relief Mr. Falk prayed for was "For the entry of orders requiring
13 Defendant Ephrem to assign his interest in the lease purchase option on the residential property
14 described in Paragraph 1.2 and for the delivery of the Rolex watch, *all for liquidation and*
15 *application against the aforesaid debt.*" (Italic added). Complaint pg. 6-7, para. 6.6.
16

17 18 **III. ISSUE STATEMENTS**

19 Does paying the entire monetary judgment of the court constitute full satisfaction of the
20 court's judgment when the only other relief requested was for assets to be liquidated and applied
21 to the original debt?

22 **IV. LEGAL AUTHORITY AND DISCUSSION**

23 Other than a monetary judgment, Mr. Falk only requested that the "lease purchase
24 option" and the Rolex watch be "liquidated" to pay off the debt. Complaint pg 6-7. The entire
25

1 judgment on the debt has been paid. Consequently, there is no need or ability to pay the debt
2 from the proceeds of the liquidation of the Rolex watch or "lease purchase option."

3 The court does not have jurisdiction to grant a judgment that exceeds the relief Mr. Falk
4 prayed for in his Complaint. Any such award is void.

5 When a judgment or decree is entered by default, it 'shall not be
6 different in kind from or exceed the amount that [was] prayed for
7 in the demand for judgment.' Indeed, "a court has no jurisdiction
to grant relief beyond that sought in the complaint."

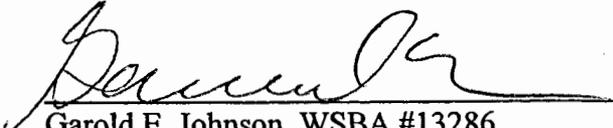
8 *In re Marriage of Hughes*, 128 Wn. App. 650, 658, 116 P.3d 1042, 1046 (2005) quoting
9 *In re Marriage of Johnson*, 107 Wn. App. 500, 503-4, 27 P.3d 654 (2001), CR 54(c) and *Matter*
10 *of Marriage of Leslie*, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989); *State ex rel. Adams v.*
11 *Superior Court of State, Pierce County*, 36 Wn.2d 868, 220 P.2d 1081, 1084 (1950).

12 V. CONCLUSION

13 For the foregoing reasons, Defendant Tina Ephrem respectfully moves the court for an
14 order declaring that all prior judgments of the court have been fully satisfied.

15 DATED this 5th day of October, 2006.

16 MANN, JOHNSON, WOOSTER
17 & MCLAUGHLIN, P.S.

18
19
20 
21 Garold E. Johnson, WSBA #13286
Attorneys for Defendant Tina Ephrem

Ephrent

PIERCE COUNTY SUPERIOR COURT
TACOMA WA
KEVIN STOCK
CLERK OF THE SUPERIOR COURT

Rcpt. Date: 09/11/2006
Acct. Date: 09/11/2006
Receipt #: 2006-01-12653
Cashier ID: MLN
Time: 03:09 PM

Item	Case Number	Amount
01	05-2-11420-2	\$20,000.00
	3150: Trust-Tender	
	\$TRT	
	SGB	

Total Due: \$20,000.00
Check Tendered: \$20,000.00

Change Due: \$0.00

Paid By: HANN, JOHNSON, WOOSTER, -

PIERCE COUNTY SUPERIOR COURT
TACOMA WA
KEVIN STOCK
CLERK OF THE SUPERIOR COURT

Rcpt. Date: 09/11/2006
Acct. Date: 09/11/2006
Receipt #: 2006-01-12654
Cashier ID: MLN
Time: 03:09 PM

Item	Case Number	Amount
01	05-2-11420-2	\$40,113.41
	3150: Trust-Tender	
	\$TRT	
	SGB	

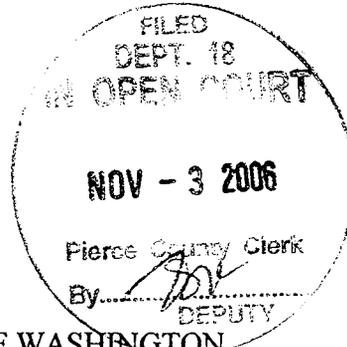
Total Due: \$40,113.41
Check Tendered: \$40,113.41

Change Due: \$0.00

Paid By: KELLEY, GEORGE ATTY AT LAW

Exhibit 1

EXHIBIT V



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

CARY FALK, a single man,)
)
Plaintiff,)
)
vs.)
)
TIMOTHY J. EPHREM and TINA EPHREM,)
husband and wife, and the marital community)
composed thereof,)
Defendant.)
)
)
)

Cause No.: 05-2-11420-2

**ORDER CONFIRMING THAT THE
JUDGMENTS HAVE BEEN FULLY
SATISFIED**

THIS MATTER having come regularly before the above-entitled Court on the motion of the Defendant, Tina Ephrem, all parties appearing and being represented by their respective Counsel, the Court having heard oral argument, having studied the records and files herein and now deeming itself fully advised, it is hereby

ORDERED, ADJUDGED AND DECREED that the judgment entered on March 2, 2006 and the Order Granting Plaintiff's Motion for Attorney Fees filed herein on August 11, 2006

ORIGINAL

TBW

1 have been, and are hereby declared, to be fully satisfied *in that Tina Ephrem has no*
2 *right pursuant to 9.16 of the Real Estate Contract, to assign it.*
3 DONE IN OPEN COURT this 3 day of October, 2006.

4 *Beverly H. Grant*
5 HONORABLE BEVERLY GRANT

6 Presented by:

7 MANN, JOHNSON, WOOSTER
8 & McLAUGHLIN, P.S.

9 *Garold E. Johnson*

10 Garold E. Johnson, WSBA # 13286
11 Attorney for Defendant Tina Ephrem

DEPT. 12
IN OPEN COURT
NOV - 3 2006
Filed *B*

12 Approved as to form:

13 *George S. Kelley*

14 George Kelley, WSBA # 2981
15 Attorney for Defendant Tim Ephrem

16 ~~Signature of presentation waived~~

17 *Edward W. Winkill*
18 Edward Winkill, WSBA # 5406
19 Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, Christine Spake, hereby certify that I am over the age of 18 years and not a party to the within action; my business address is and I am employed by Mann, Johnson, Wooster & McLaughlin, P.S., 820 A Street, Suite 550, Tacoma, Washington 98402. On the 17 day of November, 2006, a true and correct copy of:

(1) Appellants' Brief;

was delivered to:

Ed Winskill
Davies Pearson
920 Fawcett Ave.
Tacoma, WA

US MAIL
NOV 17 PM 4:46
COMMUNICATIONS
BY
COMM

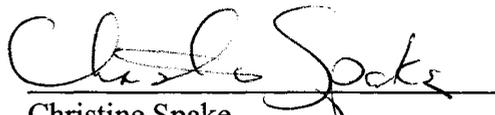
by the following method:

- Depositing same postage prepaid in the United States Mail addressed to the person(s) identified above.
- Depositing a true and accurate copy of the same with ABC-Legal Messenger Service, Inc., with appropriate instructions to deliver the same to the person(s) identified above on _____, 2006.
- Personally delivering copies to the person(s) identified above.

I herby certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington, this 17th day of November, 2006.

MANN, JOHNSON, WOOSTER
& MCLAUGHLIN, P.S.


Christine Spake