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No. 68177-01

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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WMC MORTGAGE CORP., a California corporation,  
Appellant

v.

SCOTTY'S GENERAL CONSTRUCTION, INC., A WASHINGTON  
CORPORATION,  
Respondent

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(HON. MARY E. ROBERTS)

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REPLY BRIEF OF APPELLANT

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Daniel A. Womac, WSBA No. 36394  
Daniel.Womac@fnf.com  
FIDELITY NATIONAL LAW GROUP,  
INC., A DIVISION OF FIDELITY  
NATIONAL TITLE GROUP, INC.  
Attorney for Appellant Litton Loan  
Servicing, L.P. as Attorney in Fact for  
Deutsche Bank Trust Company under  
the Pooling and Servicing Agreement  
GSAMP Trust 2005-WMCI, as  
successor to WMC Mortgage  
Corporation

FIDELITY NATIONAL LAW GROUP, INC., A DIVISION OF  
FIDELITY NATIONAL TITLE GROUP, INC.  
1200 6<sup>th</sup> Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6004  
Facsimile: 877-655-5279

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## **I. INTRODUCTION**

This appeal concerns a recorded mortgage that has incontestable priority over a junior construction lien. Appellant WMC Mortgage Corporation (WMC) was the original Beneficiary of the mortgage. The loan and deed of trust were assigned by WMC to Deutsche Bank National Trust Company (Deutsche) under the Pooling and Servicing Agreement dated September 1, 2005, GSAMP Trust 2005-WMCI. Deutsche appointed Northwest Trustee Services, Inc. (Northwest) as successor trustee under the Deed of Trust on February 26, 2010. Litton Loan Servicing, LP (Litton) was further appointed as Attorney in Fact for Deutsche. Northwest proceeded with a Trustee's Sale and delivered Deutsche a Trustee's Deed on June 25, 2010. Deutsche, through Litton, subsequently transferred the property in question to Shiad Investment, L.L.C. by way of Bargain and Sale Deed on August 23, 2010. That Deed was recorded at the King County Auditor under number 20100825001030 on August 25, 2010.

The construction lien was foreclosed in a prior suit brought by respondent Scotty's General Construction, Inc. (Scotty's). Neither Deutsche nor Litton was a party to the prior suit.

Deutsche is not bound by the foreclosure decree granted in the quasi in rem suit to which it was not a party. The failure of Scotty's to join MERS in the prior suit, or give written notice to MERS of the suit,

results in a jurisdictional defect as to Deutsche and its interest in the property. The denial of WMC's motion to vacate was an abuse of discretion, and must be reversed.

## II. ARGUMENT

### A. **There are sufficient grounds to vacate and set aside the Order of Default and Judgment against WMC.**

WMC asks this Court to set aside the order denying its motion to vacate the judgment against it. A proceeding to vacate or set aside a default judgment is equitable in character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms. *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943). This reply focuses on the dispositive procedural rule that default judgments are disfavored, and therefore, a "trial court should exercise its authority 'liberally, as well as equitably, 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, 581, 582, 599 P.2d 1289 (1979) (quoting *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968)). The Washington State Supreme Court "has long favored resolution of cases on their merits over default judgments." *Morin v. Buris*, 160 Wn.2d 745, 749 161, P.3d 956 (2007); See also *Hull v. Vining*, 17 Wash. 352, 360, 49 P. 537 (1897). The Court will, in fact, liberally set aside default judgments

pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice. *Morin*, 160 Wn.2d at 749. Courts prefer to give parties their day in court and have controversies determined on their merits. *Griggs*, 92 Wn.2d at 581 (Quoting *Dloughy v. Dloughy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960)). Here, a court has yet to hear and consider the merits of this action, since no opportunity has been afforded outside the procedural conundrum created by Scotty's in initiating its action with faulty notice and service. The default and overarching judgment applying to WMC should not prevent a decision on the merits.

Scotty's argues that Superior Court Civil Rule 60(b) is the standard that must be met and not a combination of CR 55(a) and CR 60(b). Setting aside CR 55 for the purposes of this reply, justice demands the judgment is vacated pursuant to CR 60(b).

Superior Court Civil Rule 60(b), provides in pertinent part, "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:

- (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (5) The judgment is void;
- (6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or

otherwise vacated, or it is no longer equitable that the judgment should have prospective application;  
(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;  
(11) Any other reason justifying relief from the operation of the judgment.”

CR 60(b). The Court is not bound by the one-year time limit in consideration of a Rule 60(b) motion that falls outside the 60(b) (1), (2) or (3) conditions. *Id.* In this case, the judgment is void or voidable due to the lack of adequate notice and the misrepresentation regarding joinder and mandatory pleadings.

This is a unique set of circumstances. It was commercially reasonable for WMC and Deutsche to rely on MERS to provide notice of litigation.<sup>1</sup> When Scotty’s failed to serve MERS the process failed and MERS and Deutsche were denied notice required by due process.<sup>2</sup> Further, Scotty’s did not name the right parties or even identify assignees or

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<sup>1</sup> MERS held legal title to some interest including one for notification and tracking purposes. CP 39, Exhibit B.

<sup>2</sup> In a quasi in rem proceeding “to determine the claims of specifically identified persons,” “[a]t minimum what is required is a mailed notice addressed to the person at his last reasonably discoverable address ...” Restatement (Second) of Judgments § 6 cmt. a (1982). “MERS is a private electronic database, operated by MERSCORP, Inc., that tracks the transfer of the ‘beneficial interest’ in home loans, as well as any changes in loan servicers. After a borrower takes out a home loan, the original lender may sell all or a portion of its beneficial interest in the loan and change loan servicers.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038 (9th Cir. 2011) “If the lenders sells or assigns the beneficial interest of the loan to another MERS member, the change is recorded only in the MERS database, not in the county records, because MERS continues to hold the deed on the new lender’s behalf.” *Id.* at 1039. But this minimal actual notice was not given to MERS.

successors in interest in the caption of the Complaint.<sup>3</sup> Additionally, Scotty's failure to file lis pendens further prevented Deutsche from receiving notice regarding the litigation. These failures then resulted in a massive windfall for a mechanics lien that was never in first position and, based on well-established law, would never have been in first position had Deutsche received proper notice and the opportunity to defend on the merits.

If the court determines that Deutsche is a named party, then justice demands vacating the default judgment under CR 60(b) in order to permit Deutsche to make their substantive arguments that they are prior in time and prior in right. The assignment of the Deed of Trust to Deutsche occurred in 2005 and did not need to be recorded to preserve priority. *Kelch v. Don Hoyt, Inc.*, 4 Wn. App. 580, 583, 483 P.2d 135 (1971) ("It is well established that a priority acquired by the recording of a mortgage is not lost because one holds it under an unrecorded assignment."); *Miller v. Am. Savings Bank & Trust Co.*, 119 Wash. 243, 250, 205 P. 388 (1922).

Before foreclosing Scotty's discovered that Deutsche was a real party in interest<sup>4</sup>, a fact that would not have been in doubt had they served MERS as they should have. Deutsche was a good faith purchaser with no

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<sup>3</sup> Complaint ¶ 1.2-1.6, CP1.

<sup>4</sup> Scotty's brief states: "In the beginning of July, 2010 in preparation for trial, counsel for Scotty's discovered that in April, 2010...WMC transferred title to Deutsche Bank National Trust." CP 42.

notice. Due process requires notice be reasonably calculated under all circumstances, which includes notice to interested persons identifiable through “reasonably diligent efforts.”<sup>5</sup> The trial court erred in defaulting out assignees and successors that were not named or before the court.<sup>6</sup> “The consequence of [nonjoinder] is that the interest of a person not joined may not be foreclosed or otherwise affected.” *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 891, 903, 251 P.2d 908 (2011) (Diversified Wood II, May 16, 2011) (Construing RCW 60.04.171).

In the alternative, if Deutsche is not a party then they cannot be bound by the judgment of the trial court.

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<sup>5</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (“notice reasonably calculated, under all circumstance to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” is an “elemental and fundamental requirement of due process.”); *id.* (written and mailed notice required to beneficiaries of trust estates where names and addresses were known or could be reasonably ascertained); *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 196-98, 165 P.3d 4 (2007) (regarding notice to known creditors whose identities are reasonably ascertainable through a reasonably diligent search).

<sup>6</sup> *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 877, 251 P.3d 293, 308 (2011) (Diversified Wood I, as amended Jul. 11, 2011); *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 891, 903, 251 P.2d 908 (2011) (Diversified Wood II, May 16, 2011). In *Diversified Wood II*, this Court reaffirmed: “Actions to foreclose construction liens are ‘quasi in rem,’ i.e., they determine interests of *certain defendants* in a thing in contrast to a proceeding in rem which determines the interests of all persons in the thing.” 161 Wn.2d at 902 (italics added). Deutsche was not one of those “certain defendants,” nor was its specific interest (the mortgage) joined in the suit. Therefore, as a matter of law its interest was not adjudicated.

### III. CONCLUSION

In denying the motion to vacate, the trial court ignored the clear law and made a decision on untenable grounds. Since no written findings accompanied the order, it can only be surmised what the court's reasons were, but the underlying issues and merits of this case have yet to see the light of day. If it fails to take appropriate measures to assure service on all proper parties, a mechanics lien ought never to be able to jump ahead of a purchase money mortgage. The denial of WMC's motion to vacate was an abuse of discretion, and must be reversed.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of July, 2012.

FIDELITY NATIONAL LAW GROUP,  
INC., A DIVISION OF FIDELITY  
NATIONAL TITLE GROUP, INC.

BY 

Daniel A. Womac, WSBA No. 36394  
Thomas P. Larkin II, WSBA No. 32990  
Attorney for Appellant Litton Loan  
Servicing, L.P. as Attorney in Fact for  
Deutsche Bank Trust Company under the  
Pooling and Servicing Agreement GSAMP  
Trust 2005-WMCI, as successor to WMC  
Mortgage Corporation

**CERTIFICATE OF SERVICE**

I hereby certify that on the date given below I caused to be served the foregoing document entitled REPLY BRIEF OF APPELLANT on the following individuals in the manner indicated:

Larry Barokas, WSBA # 483 BAROKAS MARTIN & TOMLINSON 1422 Bellevue Ave. Seattle, WA 98122 206-621-1871 206-621-9907 FAX <i>Attorneys for Respondent</i>	<b>X Legal Messenger</b> <b>X Facsimile</b> Hand Delivery FedEx
Hans P. Juhl, WSBA 33116 SOMERS TAMBLYN KING PLLC 2955 80th Ave SE Suite 201 Mercer Island WA 98040-2960 206-232-4959 206-232-4049 FAX <i>Attorneys for Respondent</i>	Legal Messenger <b>X Facsimile</b> Hand Delivery <b>X FedEx</b>

**SIGNED** this 20th day of July, 2012, at Seattle, Washington.

  
\_\_\_\_\_  
Nancy K. Hunt