

69124-4

69124.4

Case No. ~~69124-1~~ 69124-4

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

ANUP KHELA,

Appellants,

v.

KALEN PETERS, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, INC., ASSET MANAGEMENT HOLDINGS, LLC, 10 ASSET MANAGEMENT HOLDINGS, LLC and DOE DEFENDANTS 1 through 20,

Respondents.

FILED  
APPELLATE DIVISION  
COURT OF APPEALS  
STATE OF WASHINGTON  
2015 JUL 19 PM 4:32

**APPELLEE'S RESPONSE BRIEF**

Melissa A. Huelsman, WSBA #30935  
Attorney for Appellee Khela  
Law Offices of Melissa A. Huelsman, P.S.  
705 Second Avenue, Suite 601  
Seattle, WA 98104  
206-447-0103

**TABLE OF CONTENTS**

INTRODUCTION .....4

STANDARD ON REVIEW.....4

STATEMENT OF ISSUES.....7

ARGUMENT.....17

**I. Ms. Khela properly obtained a default judgment and  
Defendant AMH is responsible for its own failure to participate  
in the litigation. ....17**

CONCLUSION .....28

**TABLE OF AUTHORITIES**

**CASES**

*Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) ..... 6

*Borg-Warner Acceptance Corp. v. McKinsey*, 71 Wn.2d 650, 430 P.2d 584 (1967).....19

*Commercial Courier Serv. Inc. v. Miller*, 13 Wn.App. 98, 106, 533 P.2d 852 (1975).....18

*Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979) .....19, 26

*Gutz v. Johnson*, 128 Wn.App. 901, 117 P.3d 390 (2005).....19

*Jacobsen v. Defiance Lumber Co.*, 142 Wn. 642, 253 P. 1088 (1927)....21

*Merrell v. Hamilton Produce Co.*, 55 Wn.2d 684, 349 P.2d 597 (1960)..21

*Morin v. Burris*, 161 P.3d 956 (2007).....19, 25

*Norton v. Brown*, 99 Wn.App. 118, 123, 992 P.2d 1019 (1999).....18, 19

*Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943).....19

*Smith v. Arnold*, 127 Wn. App. 98, 110 P.3d 257 (2005).....26

*White v. Holm*, 73 Wash.2d 348, 352, 438 P.2d 581 (1968). 18, 19, 20, 23, 24

*Yeck v. Dept. of Labor & Indus.*, 27 Wn.2d 92, 176 P.2d 359 (1947) .5, 21

**STATUTES**

RCW 61.24.005(2)..... 6

RCW 61.24.030(7)..... 6

**RULES**

Civil Rule 60.....4, 27

## **INTRODUCTION**

This appeal was taken by Defendant Asset Management Holdings, LLC (“AMH”) because it failed to convince the trial court that Ms. Khela was responsible for the actions of its own lawyers in failing to take action to prevent the entry of a Default Judgment. AMH’s lawyers did not properly participate in the litigation since first appearing in the case on its behalf and did not handle the withdrawal from litigation properly. More importantly though, AMH did not monitor the litigation or otherwise communicate with its lawyers for years. It continues to seek to avoid completely any of its responsibility for failing to monitor the case and/or its lawyers nor does it ever adequately explain why it should be free to avoid liability for the complained of actions. AMH was responsible for its own actions in causing the wrongful foreclosure of Ms. Khela’s home in contravention of the requirements of Washington law and it was responsible for not participating in the case or even monitoring what was happening for years, such that a Default Judgment was entered against it. Thus, there is no basis whatsoever in the law for it to avoid the default judgment obtained against it.

## **STANDARD ON REVIEW**

The standard for review on a CR 60(B) motion is whether the Court abused its discretion, but the appellate court must also still look at

the facts of the case and the findings of law which are inherent in the contents of a Default Judgment. *Yeck v. Dept. of Labor & Indus.*, 27 Wn.2d 92, 176 P.2d 359 (1947). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003).

An appellate court should independently determine whether the findings of fact support the conclusions of law. *Crystal China and Gold Ltd. v. Factoria Center Investments, Inc.*, 93 Wn.App. 606, 610, 969 P.2d 1093 (1999); *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Martin v. Seattle*, 111 Wn.2d 727, 733, 765 P.2d 257 (1988); and *Persing, Dyckman & Toynbee, Inc. v. George Schofield Co., Inc.*, 25 Wn.App. 580, 582, 612 P.2d 2 (1980).

Here, the factual findings were limited to those related to AMH's refusal to monitor the litigation and its attorneys for years, and for its change of address that was apparently never communicated to anyone, including its lawyers, but which it now seeks to use to avoid liability.

Conclusions of law are reviewed *de novo*, as are the application of the facts to the law. *Id.*; *see also, Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001). Here, the record is clear that AMH was responsible for the wrongful foreclosure of Ms. Khela's home, especially since it admits it was nothing more than the

loan servicer (something which was never known by Ms. Khela) and therefore did not have the legal authority to foreclose under Washington law. *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) Although *Bain* was not decided until after the findings made in this case on both the default and denial of the motion setting aside the default, it nevertheless confirmed that only the “noteholder” and loan owner had the legal authority to initiate a nonjudicial foreclosure. RCW 61.24.005(2); 61.24.030(7). This supports Ms. Khela’s position that she was likely to prevail on her claims against AMH. Further, AMH was directly responsible for instructing the purported trustee, QLS, (who was never properly appointed) to foreclose in spite of its knowledge that the condition which preceded its nonjudicial foreclosure - potential foreclosure by the first position lienholder - had terminated with a loan modification. Ms. Khela’s injuries were directly caused by AM’s wrongful foreclosure and there was no excuse under the law for its failure to participate in the case. It is liable for Ms. Khela’s injuries and the trial court’s findings were correct factually and legally.

#### **STATEMENT OF ISSUES**

1. Did the trial court abuse its discretion when determining that AMH had not adequately participated in the case, that there were no reasonable excuses for its failure to participate, and that AMH failed to

meet its obligations as a litigant and that the equities favored Ms. Khela?

### **UNREFUTED FACTS**

The undisputed facts which lay the foundation for this case are as follows: When Ms. Khela filed her Complaint on **November 19, 2008**, she had previously owned her condominium for ten years. She began having serious financial problems in 2005 because she became seriously ill and was unable to work for lengthy periods of time. CP 33-41; 42-47, 178-179, 189-190. She filed for chapter 13 bankruptcy protection in 2005 and stayed in the bankruptcy for approximately three years. Her case was dismissed early in 2008 and thereafter her first mortgage company began foreclosure proceedings. *Id.* Her first mortgage loan was owned and/or serviced by Wells Fargo Bank. She became delinquent on the first mortgage so she began negotiating with Wells Fargo for a loan modification. After several months and significant amounts of time and energy, she received approval for the modification. *Id.* The approval notice from Wells Fargo on August 6, 2008 read that the loan modification was approved subject to its receipt of a title report (something outside of her control); sending of the actual modification agreement after her signature was obtained; and her payment of \$1,000.00 when she returned the signed agreement. *Id.* Ms. Khela signed the agreement and paid the money. *Id.*

Ms. Khela began having problems with her second mortgage loan once Wells Fargo started a foreclosure proceeding in 2008. She had obtained her second mortgage loan on March 25, 1998 from Land Home Financial Services (“Land Home”). The Deed of Trust securing the loan was recorded in the records of King County, Washington on March 31, 1998. Later in 1998, Land Home assigned its interest in her Deed of Trust to FirstPlus Financial on April 17, 1998 by signing a Corporation Assignment of Deed of Trust document. That Corporation Assignment was recorded in the records of King County, Washington on May 8, 1998. CP 33-41. There is no evidence available as to whether Land Home Financial ever transferred physical possession of the Promissory Note signed by her to anyone, let alone any of the Defendants in this case. *Id.* Certainly, AMH never asserted to the trial court at any time that it had physical possession of the Note. On or about March 18, 2008, Ms. Khela received a letter notice indicating that AMH was responsible for accepting payments on her second mortgage loan but no assignment was recorded to that effect in King County, Washington. Ms. Khela also began receiving billing statements and notices regarding the loan from AMH and she made payments on the second mortgage to AMH without knowledge of its relationship to the loan. She believed the documentation that was sent to her and followed the instructions given to her for making the mortgage

payments on the second mortgage, to AMH. CP 42-47, 178-179, 189-190.

In her bankruptcy case, 10 AMH (the entity that Appellant AMH now contends is entirely separate from it and for whose benefit it was acting as a mortgage loan servicer, Brief, 3-7) filed a motion for relief from stay and asserted to the Bankruptcy Court that it was the owner of the second mortgage loan based upon its status as “successor in interest to Land Home Financial Services.” *Id.* However, as noted above, Land Home Financial Services assigned its interest in the loan to FirstPlus Financial in 1998. FirstPlus Financial purportedly assigned its interest in her second mortgage Deed of Trust to Defendant 10 AMH on January 9, 2006 and that document was recorded in the records of King County, Washington. CP 33-41. But there is no documentation in the records of King County, Washington to evidence any purported transfer of the loan interest to AMH. *Id.* As noted above, there is no evidence regarding the physical possession of the Promissory Note and/or indorsements at the time of the nonjudicial foreclosure.

Throughout the bankruptcy proceeding, Ms. Khela, her attorney, and the chapter 13 trustee, were dealing with 10 AMH regarding her second mortgage loan payment, based upon its assertion that it was the owner. CP 42-47, 178-179, 189-190. Further, the due date for the payment on the second mortgage loan was the 29<sup>th</sup> of the month. *Id.*

After her bankruptcy was dismissed, Ms. Khela began making her second mortgage payments in a timely fashion to AMH at an address it had provided to her in Nokamis, Florida. *Id.*

Beginning in June 2008, AMH began to return Ms. Khela's payments without explanation. She then called AMH's office, calling the telephone number listed on her mortgage servicing documents. *Id.* She spoke with a woman whose voicemail message identified her as Lynne Vadnais. Ms. Khela did not receive a responsive call from Ms. Vadnais so she called again and again and again, each time leaving a message and asking for a return call to explain why her payments were being returned. *Id.* Because she was concerned about losing her home and was already trying to deal with Wells Fargo, Ms. Khela then began to communicate with her former bankruptcy attorney, Jesse Valdez, seeking his assistance in dealing with AMH. With his assistance, Ms. Khela ascertained that AMH was foreclosing on her home **only** because of the foreclosure which had been initiated by Wells Fargo on the first mortgage. Mr. Valdez apparently spoke with someone at Defendant AMH and learned that it was seeking documentary proof that she was modifying her loan with Wells Fargo before it would agree to stop the foreclosure sale. *Id.* Ms. Khela continued to mail in her monthly payments when due to AMH, but they were repeatedly returned to her without explanation. Ms. Khela also

continued to leave messages for Ms. Vadnais which were often unreturned. At other times, she did speak with Ms. Vadnais who repeatedly stated that as soon as Ms. Khela was approved for the modification with Wells Fargo, the foreclosure initiated by AMH would be stopped. Therefore, Ms. Khela kept working with Wells Fargo to get that loan modification approved. *Id.*

In August 2008, as soon as Ms. Khela received verification from Wells Fargo that her loan modification had been approved, she sent a copy of the verification letter to AMH, addressed to Ms. Vadnais, asking for a call to discuss reinstatement of the second mortgage loan. *Id.* That document was also returned to Ms. Khela by AMH without explanation or any other responsive materials late in August 2008. She then began frantically calling AMH and Ms. Vadnais regularly trying to get this matter resolved. Ms. Khela provided Ms. Vadnais with contact information for the people at Wells Fargo with whom she was dealing on the loan modification. Ms. Khela was repeatedly advised by the staff at Wells Fargo that they had spoken with Ms. Vadnais and verified that she had received a loan modification. *Id.*

Meanwhile, Ms. Khela also contacted QLS asking for payoff information as she had friends and/or church members who were going to assist her in getting together funds to cure the default. *Id.* Ms. Khela

called QLS and was provided with an email address to use, quotes@qualityloan.com. Ms. Khela sent emails on September 8, 2008 and again on September 30, 2008, but she never received a response to those emails. *Id.* On October 3 or October 6, 2008, she called the offices of QLS and spoke to the woman who answered the telephone. She asked about the sale of her home and provided the identifying information. *Id.* She indicated that she wanted to know the amount to cure the default, and was advised that the sale had been cancelled. Ms. Khela confirmed this information with the woman and then terminated the telephone call. *Id.* That night, just to be sure that the information Ms. Khela received was correct, she called the information line provided by QLS and entered the information for her property. The recorded message indicated that the sale of her property was cancelled. *Id.* Ms. Khela made handwritten notations on her personal papers when she received this news. Thereafter, Ms. Khela continued to try to contact AMH to find out how she should go about curing the arrears on that loan in order to get it back on track, but she never received any response from AMH and/or Ms. Vadnais. Instead, on October 20, 2008, she was served with a notice from Kalen Peters that he had purchased title to her property at the foreclosure sale on October 17, 2008. This was the first time that she became aware that QLS had completed with foreclosing on her property. *Id.*

Evidence presented during the discovery process in this case by QLS makes it clear that Ms. Vadnais was well aware that Ms. Khela had entered into a forbearance agreement with Wells Fargo and that the foreclosure it initiated had been cancelled. CP 850-861; 1060-1092. In spite of the fact that QLS' employees told AMH and/or 10 AMH about the terminated Wells Fargo foreclosure, Ms. Vadnais insisted that the foreclosure sale proceed. *Id.* Thus, AMH is directly responsible for Ms. Khela losing her home and all of the equity therein. *Id.*

Ms. Khela provided testimony to the Court which laid out the dollar amounts that she incurred as damages and identified the documentation which supported those claims. *Id.*; CP 1093-1094. In addition, she was entitled to payment of her attorneys' fees and costs, which were also supported by a Declaration of Ms. Huelsman. *Id.*

AMH was served with the Summons and Complaint in this case on December 3, 2008 at 1000 Tamiami Trail North, Nokomis, Florida 34275 and related 10-AMH was served on December 1, 2008 at 1545 NE 123<sup>rd</sup> Street, North Miami, Florida 33161. CP 30; 65. The law firm of McCarthy Holthus appeared on its behalf on January 2, 2009. CP 26-27; 173-175 The attorneys at McCarthy Holthus also appeared on behalf of the company owned by these same law partners, Quality Loan Service Corporation of Washington. *Id.*

As admitted by AMH, the attorneys at McCarthy Holthus advised it and 10-AMH on **September 24, 2009** that it was withdrawing from the representation. CP 1183-1207. AMH points out that the form sent to it by McCarthy Holthus was on a pleading using an unlawful detainer cause number. *Id.* While it did have the wrong case number, that speaks to the incompetency of its attorneys but is not a factor in analyzing the handling of this case after the fact. The caption was correct and it contained more than enough information for AMH to be on notice that its attorneys were attempting to withdraw from representation. The fact that their attorneys used the wrong case number is merely an excuse that AMH is trying to use now to avoid responsibility for its own dilatory actions. It is incredible for AMH to assert that somehow the non-lawyer personnel at AMH looked up the cause number listed on the letter and ignored the case name listed, but even if they did so, they did so at their own peril. There is absolutely nothing in the Declarations supplied to the trial court which describe the actions taken by AMH when it became aware of the attempted withdrawal and even more tellingly, AMH does not bother to even try to explain why it apparently has not made any inquiries about the case – filed in 2008 – until more than three years later when it received the Judgment. Certainly, there is a requirement that a participant in litigation exercise diligence about the litigation.

Ms. Khela acted diligently and obtained a Judgment. In fact, she had problems with getting the first Motion for Judgment properly served and had to do it a second time. CP 1027-1039; 1047-1057. It was served a second time on AMH at the address provided by its attorneys and on its attorneys, McCarthy Holthus. *Id.* But because the Ex Parte Department wanted it heard by the assigned judge, it was filed and served a third time. *Id.* Counsel for Ms. Khela noted she used the addresses for AMH and 10-AMH which were listed on the Notice of Intent to Withdraw, and even sought to locate other address information by conducting an independent search. *Id.*

AMH ignores completely the failure of its former counsel and tries to place the blame its refusal to participate in the case Plaintiff. The attorneys at McCarthy Holthus served Plaintiff with a Notice of Intent to Withdraw and that document was provided to the Court in her pleadings. CP 1256-1363. She had no reason to check the docket to double check on whether it had been filed by those attorneys or not. But in fact, Ms. Khela did discover the failure by McCarthy Holthus and pointed it out to the Court in her Motion for Default Judgment at Page 3, lines 10-11. *Id.*

Ms. Khela also tried mailing to another address she obtained doing a Google search for the defendant and mailed to that address. She used the mailing address which matched with the Service of Process address

from December 2008 and which was the same address provided by Defendant AMH's former counsel. *Id.* She served the new attorneys at McCarthy Holthus, since Mr. Cleverly and Ms. Deerfield had left the firm and did not take any business with them. It is unfortunate for AMH that it chose to retain an incompetent law firm, but its complaint lies with the lawyers at McCarthy Holthus, not with Ms. Khela. This is especially true given that AMH did absolutely nothing for three years to monitor the case.

The trial court carefully scrutinized the Motion for Default Judgment and reduced the attorneys' fee award. CP 1149-1150. It made a proper determination about the damages Ms. Khela incurred as a result of the actions of AMH and Ms. Khela would clearly suffer a hardship if AMH was permitted to ignore its responsibilities in this case for so many years and revive a long resolved case when it has been so completely irresponsible. AMH made a conscious choice to ignore communications from its attorneys about this case, and it did not bother to inquire about the case with those attorneys for more than two years. It did not check the docket in this case or inquire of anyone about its status. No answer was ever filed and the case law regarding nonjudicial foreclosures makes clear that AMH was without the legal authority to foreclose on Ms. Khela's home. This is especially true in light of the false statements made to her about the foreclosure by Ms. Vadnais (who presented the trial court with

testimony seeking to avoid the Judgment which resulted, in part, from her own actions). The evidence considered by the trial court in support of the Default Judgment proved Ms. Khela's assertions about the instructions given by Ms. Vadnais. CP 1060-1092; 1093-1134. AMH chose not to participate in the litigation and therefore a Default Judgment was entirely appropriate, but even if it had chosen to do so, Ms. Khela would likely have prevailed given that AMH did not have the right to foreclose nonjudicially and its employees had lied to Ms. Khela about stopping the foreclosure because the only basis for the foreclosure – the first position foreclosure – was no longer going to happen. After all, Ms. Khela had been timely making her payments to AMH but they were being returned. Ms. Khela should have been able to keep her home and the equity therein but for the actions of AMH – an entity without the legal authority to foreclose and an entity who did not take seriously the litigation that was initiated. AMH did not meet its burden in demonstrating a reason to vacate the Default Judgment and it has not done so on this appeal.

### **ARGUMENT**

**I. Ms. Khela properly obtained a default judgment and Defendant AMH is responsible for its own failure to participate in the litigation.**

CR 60 provides guidance for what justifies relief from judgment or order. Specifically, CR 60 (b) states that,

“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 proceedings for the following reasons: (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order...”

Excusable neglect is determined on a case-by-case basis. *Norton v. Brown*, 99 Wn.App. 118, 123, 992 P.2d 1019 (1999). Excusable neglect is not established when a party disregards process, whether willful or due to inattention or carelessness. *Commercial Courier Serv. Inc. v. Miller*, 13 Wn.App. 98, 106, 533 P.2d 852 (1975).

AMH essentially argues there is excusable neglect and attempts to shift the blame for its own failure to the Plaintiff. The Court in *Norton v. Brown*, 99 Wn.App 118 (1999) discussed this neglect. In *Norton* the defendant failed to immediately forward the summons and complaint to their counsel upon being served.

When deciding a motion to vacate a default judgment, the court must consider two primary and two secondary factors that must be shown by the moving party. *White v. Holm*, 73 Wash.2d 348, 352, 438 P.2d 581 (1968). As a result, in order to convince the trial court to set aside the default judgment, Mr. Brown first had to show: (1) the existence of substantial evidence to support at least a prima facie defense to the claim that the damages were excessive; and (2) his failure to timely appear was the result of mistake, inadvertence, surprise or excusable neglect. Next, he had to show that he exercised diligence in seeking relief after notice of the default judgment and that the effect on Mr. Norton would not be prejudicial if the judgment was vacated.

These factors are interdependent; thus, the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors. *Id.* at 352-53, 438 P.2d 581.

*Norton*, at 123.

AMH cites extensively to *White v. Holm*, 73 Wash.2d 348, 352, 438 P.2d 581 (1968), which formed the basis for the Court's opinion in *Norton* and articulates the standards to be used when evaluating a motion to set aside a default. Generally courts do not favor defaults and prefer the cases be decided on their merits, *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979), but an proceeding to vacate or set aside a default judgment is equitable in nature. *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943). Nevertheless, litigants must still maintain some level of responsibility for their participation in the legal process. *Morin v. Burris*, 161 P.3d 956 (2007) (involving the impact of informal "notices of appearance" in several cases). In *Morin*, the Court cited with approval the decision in *Gutz v. Johnson*, 128 Wn.App. 901, 117 P.3d 390 (2005) in deciding in favor of the Gutzes in that case, it nevertheless noted that it was doing so based upon the particular facts of that case (which involved plaintiff's counsel affirmative steps to hide the existence of litigation), not because of a broader deviation from the standards outlined in *White*.

In this case, the trial court properly found that AMH did not meet

of three of the four *White* criteria. Contrary to AMH's blanket assertion that this Court should with little consideration override the sound discretion of the trial court, the *White* Court noted that, "[T]his court, sitting in appellate review, will not disturb the trial court's disposition of the motion unless it be made to plainly appear that sound discretion has been abused." *White* at 351, citing to *Borg-Warner Acceptance Corp. v. McKinsey*, 71 Wn.2d 650, 430 P.2d 584 (1967). Although it also acknowledged that "abuse of discretion more readily found" when there has been a denial of a trial on the merits. *Id.*

The first two "primary" considerations of the trial court are "(1) That there is substantial evidence extant to support, at least *prima facie*, a defense to the claim asserted by the opposing party; and (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect." *White* at 352. The Court noted:

The first two are the major elements to be demonstrated by the moving party, and they, coupled with the secondary factors vary in dispositive significance as the circumstances of the particular case dictate. Thus, where the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reasons which occasioned entry of the default, **provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful. On the other hand, where the moving party is unable to show a strong or conclusive defense, but is able to properly demonstrate a**

**defense that would, *prima facie* at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, as will the seasonability of his application and the element of potential hardship on the opposing party.**

*White v. Holm*, at 352 (emphasis added), citing to *Jacobsen v. Defiance Lumber Co.*, 142 Wn. 642, 253 P. 1088 (1927); *Yeck v. Dept. of Labor & Indus.*, *supra*; *Merrell v. Hamilton Produce Co.*, 55 Wn.2d 684, 349 P.2d 597 (1960). Here, AMH was not timely in its application for relief, having not participated in the case for three years in any way and waiting more than one year after entry of the default order to seek relief. Further, AMH was completely willful in its refusal to participate in the litigation, refusal to monitor the litigation or communicate with its attorneys, and even after receiving the Notice of Withdrawal from its attorneys, it did absolutely nothing to check on the status of the litigation or communicate with its attorneys. Ms. Khela maintains that AMH has no valid defense to the claims against it, as borne out by Washington Supreme Court decisions about the requirements of a nonjudicial foreclosure and in light of the evidence adduced against it through the records of QLS, but even if it had a viable defense, its own willfulness in refusing to participate in the litigation weigh against it being granted equitable relief in the form of relief from the judgment by this Court.

AMH obtained counsel after being served with the summons and complaint and counsel appeared in the case, but that was the extent of its involvement on behalf of AMH and 10-AMH. McCarthy Holthus, whose law partners own and control the trustee defendant in the case, QLS, represented QLS and reached a settlement with Ms. Khela that resulted from its dismissal of the case. CP 1147-1148. But McCarthy Holthus apparently decided not to adequately represent AMH and 10-AMH and served upon Plaintiff and improper Notice of Withdrawal. AMH admitted in pleadings and at oral argument that it ignored the notice, ostensibly because the case number did not match up with court records, but it refused to explain why it ignored the fact that the pleading contained the correct case caption. VR 8:20-22; 11:10-13:21. Even when seeking equitable relief from the judgment, AMH refused to explain why it had had no contact whatsoever from its attorneys for at least three years but it did nothing to find out the status of the litigation. *Id.* One wonders why it didn't question the reason it wasn't receiving bills for the work that was supposed to be performed in the case. Instead of accepting responsibility for its own actions and the incompetence of the law firm it retained, AMH continues to blame the Plaintiff. *Id.*

Contrary to the assertions of AMH, the trial court did give particular weight to some of the facts presented. The trial court found that

AMH had made a *prima facie* showing that it had a defense to the claim made against it. Ms. Khela disagrees, for the reasons stated above, but on that factor, the trial court found in favor of AMH. VR 23:3-11. But on the rest of the criteria, including the second “primary” consideration, the court properly found that AMH was not entitled to equitable relief. VR 23:12-21. The trial court found that to the extent that there was any “mistake, inadvertence, surprise or excusable neglect”, it was “on behalf of defense counsel”, noting the incorrect case number on the Notice of Withdrawal, but also noting that the caption was correct. But then the Court noted that AMH “dis absolutely nothing in response to receiving this notice.” VR 23:22-24:15. The Court also found that defense counsel should have done something in response to being served with the multiple pleadings used to try to obtain a default. VR 24:16-25:18. The Court then found that AMH had not demonstrated that there was an excusable “mistake”, except that the law firm which was representing them did not fulfill their obligations. But the responsibility for that failure lies with AMH to resolve with McCarthy Holthus. It did not support a finding that favored AMH nor absolved it of responsibility for its own many years of inaction and inattention to this case. *Id.* This is consistent with the findings in *White*, where the Court noted that the significant equitable relief afforded to those against whom a default judgment is entered is not available when the

actions of the moving party was “willful.” AMH made a choice to do nothing when it received the Notice of Withdrawal. It would be inequitable to afford it any sort of relief.

Turning to the two other criteria laid out in *White*, the Court correctly found that AMH was not diligent in its actions and that the Judgment was on record for more than one year until it sought to have it set aside. As the trial court noted, there was no explanation given for why AMH did nothing to look at the record of this case when it could have obtained information about the Judgment by doing so. AMH testified after the fact about its employee allegedly searching court records for the wrong case number, but left completely unexplained why it did not otherwise check the docket using the correct case number for a case in which it was involved when it apparently had not received any communication from its lawyers about the case for years, except for a Notice of Withdrawal. VR 25:19-26:11.

Further, the equities favor Ms. Khela. She immediately pursued her claims against AMH and others when she was wrongfully foreclosed. The various Defendants lied to her about the loan modification information status and about the pending foreclosure. Thus, she was prevented from taking action to prevent the loss of her home. CP 1093-1134. Most tellingly, the person with whom Ms. Khela specifically

communicated about the loan and pending foreclosure, who was specifically identified in the Complaint and in subsequent Declarations filed with the Court, Lynn Vadnais, provided a declaration to the trial court in connection with trying to obtain relief from the Judgment. Ms. Vadnais provided no relevant testimony to refute Ms. Khela's factual assertions to the contrary except to attach copies of a letter and an email. She never rebutted the assertions made by Ms. Khela in her Declarations, which makes clear that AMH had not even a *prima facie* defense to the claims. But more importantly, it demonstrates that the equities favor Ms. Khela because even after being afforded an opportunity to at last rebut Ms. Khela's assertions, and the documentary evidence of her statements to QLS that were admitted in support of the Default Judgment, Ms. Vadnais and AMH could not refute Ms. Khela's assertions. Thus, Ms. Khela was properly awarded a Default Judgment based upon her testimony and other evidence adduced when McCarthy Holthus were actively involved in the litigation on behalf of QLS, its other client, and she should not have been denied that Judgment because AMH sat on its hands for years and refused completely to be responsible for its role as a defendant in this case.

As noted above, default judgments are not preferred by the Courts. *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). However, there are times when it is appropriate for default judgments to remain

intact, and this is one of those times. The dislike of entry of a default order must be balanced against “the necessity of having a responsive and responsible system which mandates compliance with judicial summons, that is a structured, orderly system not dependent upon the whims of those who participate therein, whether by choice or by the coercion of a summons and complaint.” *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

In *Smith v. Arnold*, 127 Wn. App. 98, 110 P.3d 257 (2005, Div. II) the court recognized this principle, and upheld denial of a motion to set aside a default. It held as follows, at 113:

Moreover, even were the issue preserved, there is no evidence to support a conclusion that the failure to appear was the result of excusable neglect. Smith served the Arnolds more than two months before the default order was obtained. By the Arnolds' own admission, they did not respond or forward the documents to Allstate because the suit "was quite low on [their] list of priorities at the time." CP at 23. **In addition, Allstate waited 20 days before contacting Smith after it received the summons and complaint. Although Allstate attributed this delay to the assigned claims adjuster being on vacation, this 20-day period included 13 business days, only four of which were during the employee's vacation.** And once the claims adjuster learned of the two-month-old lawsuit on December 10, Allstate waited another 17 days before filing a notice of appearance.

[emphasis added].

To the extent that AMH attempts to equate these problems that are tantamount to “administrative errors”, they too are not good cause to set aside a default.

The Motion itself was not brought within one year of entry of the Order. CR 60(b). If AMH had paid any attention at all to the case, it might have been able to get into court before the one year had passed but it did not. There is no evidence before this Court except that of intentional neglect and misrepresentation after misrepresentation by AMH.

Finally, AMH asserts that somehow there could not have been any liability found because AFTER the foreclosure that was improperly done by the AMH and the other Defendants, Ms. Khela defaulted on her loan modification agreement with Wells Fargo. Brief at 19. Of course, this assertion is nonsensical. First, what happened after the subject foreclosure is not relevant to whether or not the foreclosure was properly and legally done in the first place. Second, and more importantly, Ms. Khela lost title to the property because of the actions of AMH and the other Defendants. She was evicted from the property by Mr. Peters and eventually forced to leave, but until that happened, she was actually continuing to make payments to Wells Fargo. She had also stopped making the homeowners’ association payments because she didn’t own the property and that entity

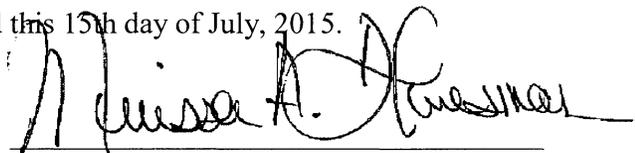
started a foreclosure as well because Mr. Peters was not paying them. CP 178-179; 197-202. Ms. Khela attempted to stop the eviction from the property but was denied that relief by the trial court in this case following a hearing and was denied again by the court handling the eviction. CP 191-193; 195-196; 197-202. Ms. Khela tried to stop the foreclosure of the property by the homeowners' association. CP 349-360. Why would she keep paying the mortgage to Wells Fargo when she no longer owned the property? The property was later foreclosed by Wells Fargo after **Mr. Peters** did not pay the Wells Fargo mortgage by selling the property. CP 1246-1249. Mr. Humphrey's has actively tried to mislead this Court by acting as though Ms. Khela was still living in the property and had stopped making her first mortgage payment. When the property was eventually foreclosed in **February 2011**, it was more than two years after Ms. Khela had been forced to move out of the property because she was denied injunctive relief to prevent the eviction. CP 191-193; 195-196; 197-202. AMH is purposely misleading this Court in yet another attempt to avoid its responsibility for its own actions.

### **CONCLUSION**

Ms. Khela lost her home and her equity in that property because of the intentional and wrongful acts by AMH and the other defendants. She acted promptly to obtain relief and she did everything possible to avoid the

ramifications of the wrongful foreclosure, to no avail. AMH sat on its hands and completely ignored the case for years. It did not monitor the case, even though apparently its employees knew how to access court information electronically, and it did not communicate with or monitor its attorneys. It did absolutely nothing until it was faced with paying a Judgment. Its actions were at all times willful and irresponsible, and there is no room in an equitable analysis for it to avoid liability for its willful actions. It is particularly offensive that it is seeking equitable relief when it is misleading this Court about significant facts in this case, including contending that Ms. Khela would have been foreclosed on the Wells Fargo loan anyway because of the foreclosure two years later, that was predicated upon the refusal of Mr. Peters, as the new property owner, to either sell the property or otherwise payoff Wells Fargo. For all of these reasons, Ms. Khela asks that this Court affirm the trial court and award her attorneys' fees and costs for having to defend this appeal.

Respectfully submitted this 15<sup>th</sup> day of July, 2015.

A handwritten signature in black ink, appearing to read "Melissa A. Huelsman". The signature is written in a cursive style with a horizontal line extending to the right.

Melissa A. Huelsman, WSBA # 30935  
Attorney for Appellant Anup Khela

**CERTIFICATE OF SERVICE**

I, Carl Turner, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on July 15, 2015, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

Duncan C. Turner Daniel Rogers BADGLEY MULLINS TURNER 19929 Ballinger Way NE, Suite 200 Shoreline, WA 98155 206-621-6566 Email: duncanturner@badgleynullins.com Email: jhumphreys@badgleynullins.com	<input type="checkbox"/> Legal Messenger: <input type="checkbox"/> Same Day <input type="checkbox"/> Next Day <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <hr/>
--	---

2015 JUL 15 PM 4: 32  
COURT OF APPEALS  
STATE OF WASHINGTON

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

Dated July 15, 2015, at Seattle, Washington.

/s/ Carl Turner  
Carl Turner, Legal Assistant