IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EMERALD GARDENS CONDOMINIUM ASSOCIATION, Appellant, v. U.S. BANK N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF MASTR ASSET BACKED SECURITIES TRUST, 2006-AM1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AM1, Respondent.	)	NO. 65857-3-I DIVISION ONE UNPUBLISHED OPINION FILED: November 7, 2011

Leach, A.C.J. — Emerald Greens Condominium Association (Association) appeals a trial court's decision setting aside an order of default and vacating a decree quieting title in real property. Because U.S. Bank failed to appear in the Association's quiet title action for reasons other than mistake, inadvertence, surprise, or excusable neglect, and failed to present prima facie evidence of a defense to the Association's claim, we reverse and direct the trial court to reinstate the order of default and decree quieting title in the Association.

FACTS

Elizabeth Swanson secured a purchase money loan from Aames Funding

Corporation, d/b/a Aames Home Loan (Aames), with a deed of trust, recorded in a first lien position against her condominium unit.

In April 2007, Ocwen Loan Servicing LLC recorded a notice of trustee's sale for this property that identified U.S. Bank as the current beneficiary of the deed of trust. The notice recited that Swanson's condominium was

> subject to that certain Deed of Trust dated 9/9/2005, recorded 10/3/2005, . . . from ELIZABETH SWANSON . . . as Grantor(s), to KAREN L. GIBBON, PS, as Trustee, to secure an obligation in favor of AAMES FUNDING CORPORATION DBA AAMES HOME LOAN, as Beneficiary, . . . the beneficial interest in which was assigned by AAMES FUNDING CORPORATION DBA AAMES HOME LOAN to U.S. Bank, N.A., as Trustee for the registered holders of MASTR Asset Backed Securities Trust.

But this recital was not true. Instead, on May 25, 2007, Accredited Home Lenders Inc., successor by merger to Aames, assigned "[a]ll beneficial interest" in the deed of trust to Ocwen Loan Servicing. Then, on June 1, 2007, Ocwen assigned its interest to U.S. Bank. These two assignments were recorded with the Snohomish County Auditor on June 15, 2007.

Earlier, on May 15, the Association filed a complaint against Swanson and Aames, seeking to foreclose a lien for unpaid condominium assessments on Swanson's unit. Three days later, the Association recorded a lis pendens against the property.

The Association served Aames, but it failed to appear in the action. On July 6, 2007, the Association obtained entry of an order of default against

Aames. On October 12, 2007, the court entered a "Stipulated/Default Judgment, Order and Foreclosure Decree." Swanson stipulated to its entry through counsel. The decree (1) awarded judgment to the Association and declared its lien valid and exempt from homestead protection, (2) foreclosed the lien and directed the sheriff to sell the property if the judgment was not promptly paid, and (3) declared the rights of Aames and all persons claiming under it to be subordinate to the Association's lien and foreclosed those rights, except for any right of redemption.

The Association purchased the condominium unit at a sheriff's sale held in February 2009. After the one-year redemption period expired without redemption by any party, the Association received a sheriff's deed conveying the property to it.

U.S. Bank claims that it first became aware of the lien foreclosure proceedings in February 2010, after it completed foreclosure of its deed of trust.[1] Shortly afterward, U.S. Bank's attorney Kelly Sutherland sent the Association's attorney, Patrick McDonald, a letter, stating, "Pursuant to our telephone conversation, this office is representing [U.S. Bank,] successor beneficiary holders of the 1st [Deed of Trust] on . . . the subject loan. My clients are disputing the priority of the Sheriff's Deed." Sutherland also asked McDonald to

[1] U.S. Bank's foreclosure proceedings stopped and started several times due to agreements with Swanson, Swanson's bankruptcy filing, and efforts to obtain relief from an automatic stay.

"provide . . . [a] breakdown of your client's total amount of Judgment, including any attorney fees and advances for taxes and other liens on . . . the subject loan." McDonald responded by letter a few days later. He wrote,

> As you know, Emerald Gardens Condominium Association . . . properly served the lender of record and foreclosed the lender's interest in the above-referenced condominium unit . . . .
>
> As a result, my client bid the full judgment amount at the sheriff's sale, the redemption period expired without redemption by any party, a sheriff's deed was issued to the Association, and the Association now owns the property free and clear. Therefore, there is no judgment balance upon which to give a payoff as you request.

Two months later, in an effort to remove any potential cloud on the title, the Association served U.S. Bank with a summons and complaint to quiet title to the subject property.[2] U.S. Bank, the only defendant in the action, failed to appear or file an answer within the 20 days allowed by CR 4. The Association then obtained entry of an order of default and an order and decree quieting title in its favor.

U.S. Bank moved to set aside the default and vacate the decree under CR 55 and CR 60. A court commissioner granted the relief requested. The trial court denied the Association's motion for revision.

The Association appeals.

STANDARD OF REVIEW

[2] The record shows that the Association effected service on May 17 and filed its complaint on June 10.

When a party appeals an order denying revision of a court commissioner's decision, this court reviews the superior court's decision, not the commissioner's.[3] We review a trial court's decision on both a motion for default judgment and a motion to vacate a default judgment for an abuse of discretion.[4] Discretion is abused if it is based on untenable grounds or reasons,[5] and a decision is untenable if it rests on an erroneous application of law.[6] We review questions of law de novo.[7]

ANALYSIS

We must decide whether the trial court abused its discretion when it denied the Association's motion for revision. This requires resolution of three underlying issues: (1) whether U.S. Bank was entitled to notice of the Association's motion for default under CR 55(a)(3), (2) whether U.S. Bank presented substantial evidence of a prima facie defense available to it in the quiet title action, and (3) whether U.S. Bank's failure to appear in the quiet title action was due to surprise or excusable neglect.

A court will set aside a default judgment entered against a party entitled to notice who did not receive it.[8] The Association argues that U.S. Bank was not

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[3] In re Marriage of Williams, 156 Wn. App. 22, 27, 232 P.3d 573 (2010).

[4] Morin v. Burris, 160 Wn.2d 745, 753, 161 P.3d 956 (2007); Hwang v. McMahill, 103 Wn. App. 945, 949, 15 P.3d 172 (2000).

[5] Morin, 160 Wn.2d at 753.

[6] State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

[7] Morin, 160 Wn.2d at 753.

entitled to notice of the motion for default because neither U.S. Bank nor Sutherland appeared in the quiet title action. In response, U.S. Bank asserts that Sutherland's prelitigation contacts with McDonald substantially complied with any appearance requirement. Thus, according to U.S. Bank, it was entitled to notice of the Association's motion for default. We agree with the Association.

CR 55(a)(3) requires notice of a motion for default be given to any party who has appeared in the action. It states,

> Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion. Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion.

Washington courts apply a substantial compliance test to determine whether CR 55(a)(3) requires notice.[9]

In Morin v. Burris,[10] our Supreme Court held that prelitigation contacts alone are not sufficient to establish substantial compliance with the appearance requirements of CR 55(a)(3). Instead, those who are properly served with a summons and complaint must in some way appear and acknowledge the jurisdiction of the court after they are served and litigation commences.[11] Otherwise, "any party to a dispute [could] simply write a letter expressing intent

[8] Morin, 160 Wn.2d at 749.
[9] Morin, 160 Wn.2d at 749.
[10] 160 Wn.2d 745, 757, 161 P.3d 956 (2007).
[11] Morin, 160 Wn.2d at 749.

to contest litigation, then ignore the summons and complaint or other formal process and wait for the notice of default judgment before deciding whether a defense is worth pursuing."[12]

As Morin makes clear, Sutherland's prelitigation contact with McDonald by itself is not sufficient to show substantial compliance with CR 55(a)(3), even though it expressed an intent to defend. U.S. Bank had no contact with the Association or its counsel between the time it was served with the summons and complaint and the order of default entered. U.S. Bank's failure to appear during this interval relieved the Association of any obligation to provide the bank with written notice of a motion for default.

U.S. Bank disagrees. Citing Sacotte Construction, Inc. v. National Fire & Marine Insurance Co.[13] and Old Republic National Title Insurance Co. v. Law Office of Robert E. Brandt, PLLC,[14] the bank claims it substantially complied with any appearance requirement because McDonald had prior dealings with Sutherland and knew that Sutherland represented the bank in related matters.[15] But neither case supports U.S. Bank's position. Instead, Sacotte and Old

[12] Morin, 160 Wn.2d at 757.

[13] 143 Wn. App. 410, 177 P.3d 1147 (2008).

[14] 142 Wn. App. 71, 174 P.3d 133 (2007).

[15] U.S. Bank alleges that Sutherland represented it in a dispute regarding the wrongful foreclosure of the property. However, U.S. Bank never filed a motion to vacate or otherwise challenged the foreclosure decree, which was adjudicated some three years earlier. Thus, contrary to U.S. Bank's implication, no legal action was pending in February 2010.

Republic apply the rule announced in Morin and rely upon contacts made after the commencement of litigation to establish substantial compliance with appearance requirements.

In both Sacotte and Old Republic, the defaulted party made an informal appearance after the plaintiff commenced the action. In Sacotte, the court held that a telephone call made after litigation had commenced established substantial compliance with the appearance requirements of CR 55(a)(3)[16] Citing Morin, the court stated, "[S]ubstantial compliance can be accomplished with an informal appearance if the party shows intent to defend and acknowledges the court's jurisdiction over the matter after the summons and complaint are filed."[17] Old Republic is similar. There, the court also held that a telephone call made after litigation had commenced substantially complied with the appearance requirements of CR 55(a)(3).[18] The court observed that enforcement of a default judgment would be inequitable where the defendant's attorney called the plaintiff's attorney after the commencement of the legal action and informed him of his intent to defend.[19]

Because the bank was not entitled to notice of the motion for default, we address whether the bank established grounds for vacating the decree under CR

[16] Sacotte, 143 Wn. App. at 416.
[17] Sacotte, 143 Wn. App. at 415 (emphasis added).
[18] Old Republic, 142 Wn. App. at 73.
[19] Old Republic, 142 Wn. App. at 73, 75.

60(b)(1). Generally a default judgment "will [be] liberally set aside . . . pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice."[20] CR 55(c) provides that default judgment may be set aside "in accordance with rule 60(b)." Grounds for vacating a default judgment under CR 60(b)(1) include "[m]istake, inadvertence, surprise, excusable neglect or irregularity." In White v. Holm,[21] our Supreme Court announced four factors which must be shown by a moving party. These factors are whether (1) there is substantial evidence to support the moving party's claim of a prima facie defense; (2) the moving party's failure to timely appear in the action was occasioned by mistake, inadvertence, surprise, or excusable neglect; (3) the moving party acted with due diligence after notice of entry of the default judgment; and (4) vacating the default judgment would result in a substantial hardship to the nonmoving party.[22] Where a party fails to provide evidence of factors (1) and (2), no equitable basis exists for vacating a judgment.[23] A trial court abuses its discretion when it vacates a judgment without evidence of these two factors.[24]

U.S. Bank failed to present substantial evidence of a prima facie defense. The Association recorded its lis pendens for its original foreclosure action on

[20] Morin, 160 Wn.2d at 749.
[21] 73 Wn.2d 348, 352, 438 P.2d 581 (1968).
[22] White, 73 Wn.2d at 352.
[23] Little v. King, 160 Wn.2d 696, 706, 161 P.3d 345 (2007).
[24] Little, 160 Wn.2d at 706.

May 18, 2007. The record shows that U.S. Bank acquired its beneficial interest in the deed of trust later, on June 1, 2007. U.S. Bank presented no evidence that it acquired any interest before that date. A party that acquires an interest in real property after a lis pendens is recorded has "constructive notice" of the proceeding and "shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action."[25] U.S. Bank, therefore, had constructive notice of the Association's foreclosure action, and it is bound by those proceedings. In that proceeding, the court foreclosed the interest of the bank's predecessor in interest, Aames, and all persons claiming under it, subject only to a right of redemption. Thus, U.S. Bank cannot show that it has any defense to the Association's quiet title action.

Also, the record does not support U.S. Bank's claim that its failure to appear in the quiet title action was due to surprise or excusable neglect. As explained above, neither U.S. Bank nor Sutherland had any contact with the court or the Association between the time the bank was served and default entered. Moreover, U.S. Bank admitted to the trial court that it did not appear within 20 days because it "uses numerous outside counsel to handle its matters, [and] it took several weeks before the quiet title pleadings were properly routed

[25] RCW 4.28.320; see also Snohomish Reg'l Drug Task Force v. 414 Newberg Rd., 151 Wn. App. 743, 752, 214 P.3d 928 (2009) (once a lis pendens is filed, any party who subsequently acquires an interest in the property does so subject to the property's ultimate disposition in the pending suit), review denied, 168 Wn.2d 1019, 228 P.3d 17 (2010).

to Mr. Sutherland's office." U.S. Bank cites no authority supporting the proposition that a large corporation's failure to timely route pleadings to its attorney is somehow excusable or otherwise warrants setting aside an order of default. Implicit in the bank's argument is a notion that large organizations are entitled to more time to respond to litigation. This notion finds no support in a legal system that strives to treat all litigants equally.

CONCLUSION

We reverse and remand to the trial court to reinstate the order of default and decree quieting title to the Association.

Leach, A.C.J.

WE CONCUR

Ellington, J.

Cox, J.