3-3-2017

CMJ Properties v. JP Morgan Chase Bank Respondent's Brief Dckt. 44526

IN THE SUPREME COURT OF THE STATE OF IDAHO

CMJ PROPERTIES, LLC, an Idaho Limited Liability Company, Plaintiff-Appellant, vs. JPMORGAN CHASE BANK, N.A., a National Association, Defendant-Respondent.	Supreme Court No. 44526 Ada County Case No. CV OC 1611039

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada

Honorable Richard D. Greenwood, District Judge, Presiding

Jon A. Stenquist
Benjamin C. Ritchie
Residing at Idaho Falls, Idaho, for Defendant/Respondent JPMorgan Chase Bank, N.A.

Matthew T. Christensen
Residing at Boise, Idaho, for Plaintiff/Appellant CMJ Properties, LLC

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Page

Cases

Statutes

Other Authorities

I. STATEMENT OF THE CASE

A. Nature of the Case.

This case is an appeal from the district court's denial of Plaintiff's request for entry of default judgment against Defendant, JPMorgan Chase Bank, N.A. ("Chase" or "Respondent"), and entry of judgment *sua sponte* in favor of Chase.

B. The Course of the Proceedings.

CMJ Properties, LLC ("CMJ" or "Appellant") is an Idaho limited liability company administratively dissolved on January 24, 2017.[1] Appellant filed its Complaint to Quiet Title on June 17, 2016 (the "Complaint") (R. 4-8), seeking to quiet title against Chase.

On or about July 27, 2016, CMJ filed its Motion for Entry of Default and Default Judgment against JPMorgan Chase Bank (R. 29-31) and Affidavit of Matthew T. Christensen in Support of Motion for Entry of Default and Default Judgment ("Affidavit of Counsel") (R. 32-35). The Affidavit of Counsel alleges that Chase was properly served by process server on June 21, 2016, at the "last known address" of JPMorgan Chase Bank, CT Corporation System, 921 S. Orchard Street, Ste. G., Boise, ID 83705 and/or JP Morgan Chase Bank, N.A. 6490 S. Federal Way, Boise, ID 83716. R. 33. There is no affidavit of service provided in the record.

On or about August 3, 2016, counsel for Chase filed a Notice of Appearance and Objection to Motion for Entry of Default Judgment. R. 36-40.

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[1] The Court may take judicial notice of public records. *See* https://www.accessidaho.org/public/sos/corp/W43537.html.

On or about August 16, 2016, the court filed its Order Re: Application for Default Judgment (R. 44-48), Judgment (R. 49-50), and Order of Default (R. 42-43). The court did not include counsel for Chase in its Notice of Service for any of these August 16, 2016, documents. It can be assumed that such documents were mailed to Chase at the Boise addresses identified on the district court's Certificates of Service. R. 43, 48, and 50.

Chase filed its Motion to Dismiss (R. 51-53) and Memorandum in Support of Motion to Dismiss (R. 54-59) on or about September 2, 2016, but withdrew the motion after discovering the court had already dismissed the case. R. 60-62.

Appellant filed its Notice of Appeal on or about September 26, 2016. R. 63-67.

C. Additional Issues on Appeal.

Pursuant to Idaho Appellate Rule 35(b)(4), Chase raises the following additional issues on appeal:

1. Did the district court err in entering its Order for Entry of Default against Chase?

2. Does good cause exist to set aside the court's Order for Entry of Default?

3. Is Chase entitled to attorney's fees and costs on appeal pursuant to Idaho Appellate Rules 40 and 41 and Idaho Code Section 12-121?

II. STATEMENT OF FACTS

A. The Adjustable Rate Credit Line.

1. On or about August 7, 2007, borrower Cory Jakobson ("Borrower") executed that certain WaMu Mortgage Plus Agreement and Disclosure (the "Note"), promising

to pay Washington Mutual Bank home equity loan advances up to $155,000.00, with interest.

R. 20-28.

2. The Note contains a Due on Sale provision stating, in pertinent part:

> The loan is personal to Grantor and the entire debt shall become immediately due and payable in full upon any sale or other transfer of the Property or any interest therein by the Grantor including, without limit, any further encumbrance of the Property.

R. 22, Section V.

3. The Note contains an optional remedies provision, which states, in part:

> **11. Termination and Acceleration; Suspension of Advances and Reduction of Credit Limit; Other Remedies**
> (a) We may terminate your Credit Line and require you to pay us the entire outstanding balance of the Credit Line . . . if any of the following happen:
>
> . . .
>
> (ii) You do not meet any of the repayment terms of this Agreement.
>
> . . .
>
> (c) If, at any time, we have the right to terminate your Credit Line under Section VI.11(a) above, we may, at our sole option and without prior notice to you, then or thereafter convert any or all of your Fixed Rate Loans . . . to the balance of your Variable Rate Advances. . . . No exercise of this right to convert and nothing in this Section VI.11(c) shall constitute an election of remedies or a waiver of any of our rights under the remaining provisions of this Section VI.11, the remainder of this Agreement, the Security Instrument or at law or in equity.
>
> (e) ... Our rights under this Agreement shall be in addition to any other rights we may have under the Security Instrument or at law or in equity.

> **12. Delay in Enforcement; Corrections.** To the extent permitted by law, we may delay or waive the enforcement of any of our rights under this Agreement without losing that right or any other right and if we delay or waive any of our rights, we may enforce that right at any time in the future without advance notice . . .
>
> **13. Presentment.** You waive any statutes of limitations, and any legal requirements of presentment, demand, protest, notice of dishonor and notice of protest of this Agreement.

R. 25, ¶¶ 11-12.

B. The Deed of Trust.

4. To secure the repayment of the Note, on or about August 8, 2007, George E. Gifford, Theresa L. Gifford, Cory Jakobson, and Jennifer Jakobson (together, "Grantors") executed that certain WaMu Mortgage Plus Deed of Trust ("Deed of Trust"), recorded as Instrument No. 107115874 with the Ada County Recorder on August 16, 2007. R. 9-15.

5. The Deed of Trust contains a Due on Sale provision stating, in pertinent part:

> **Sale. Transfer or Further Encumbrance of Property.** The Loan is personal to Grantor and the entire Debt shall become immediately due and payable in full upon sale or other transfer of the Property or any interest therein by Grantor including, without limit, any further encumbrance of the Property.

R. 11, ¶ 5.

6. The Deed of Trust also contains a remedies provision, which states, in part:

> **Remedies for Default.**
> **(a)** Prompt performance under this Deed of Trust is essential. If

> Grantor doesn't pay any installment of the Debt on time, or any other event occurs that entitles Beneficiary to declare the unpaid balance of the Debt due and payable in full under the Credit Agreement, the Debt and any other money whose repayment is secured by this Deed of Trust shall immediately become due and payable in full, ***at the option of the Beneficiary***, and the total amount owed by Grantor on the day repayment in full is demanded, including all unpaid interest, will thereafter bear interest at the Rate specified in the Credit Agreement.

R. 11, ¶ 7 (emphasis added).

C. Grantor's Breach of Note and Deed of Trust.

7. Shortly after entering into the loan, on or about August 9, 2007, the Grantors transferred, by Quitclaim Deed, the real estate providing the security for the Note to Appellant. R. 5,¶¶ 6-7.

8. Sometime prior to May 29, 2010, Borrower allegedly discontinued making payments to Chase. R. 6, ¶ 13.

9. On October 13, 2010, Borrower filed a petition for bankruptcy under Chapter 7 of Title 11 of the United States Code. R. 6, ¶ 17.

10. On or about April 6, 2011, Chase filed a Motion for Relief From Stay in the Borrower's bankruptcy case. The motion requested relief from stay "in order to, **at its option**, offer, provide and enter into any potential forbearance agreement, loan modification, refinance agreement or other loan workout/loss mitigation agreement and to contact the [Borrower] via telephone or written correspondence to offer such an agreement, which shall be non-recourse unless included in a reaffirmation agreement." Mot. Relief from Stay by JPMorgan Chase Bank, In Re: Cory Michael Jakobson, No. 10-03337-TLM (Bankr. D. Idaho Apr. 6, 2011),

ECF No. 28 (emphasis added). The bankruptcy court granted Chase's request for relief. R. 7, ¶ 24.

III. STANDARD OF REVIEW

On August 16, 2016, the district court entered its Order Re: Application for Default Judgment wherein it made findings of fact and conclusions of law and denied Appellant's application for a default judgment. Findings of fact and conclusions of law are unnecessary in support of a judgment by default. *Hawkes v. Sparks*, 108 Idaho 917, 919-20, 702 P.2d 1377, 1379-80 (Idaho Ct. App. 1985). However, if a trial court makes findings of fact and conclusions of law, then the general standard for appellate review of a grant or denial from a default judgment is as follows:

> [I]f (a) the trial court makes findings of fact which are not clearly erroneous, (b) the court applies to those facts the proper criteria under Rule 60(b)(1) (tempered by the policy favoring relief in doubtful cases), and (c) the trial court's decision follows logically from application of such criteria to the facts found, then the court will be deemed to have acted within its sound discretion. Its decision will not be overturned on appeal.

Id. at 919, 702 P.2d at 1379.

IV. ARGUMENT

This Court should affirm the judgment below. The district court properly denied relief to Appellant because the statute of limitations for an action to foreclose the subject Deed of Trust has not run. Idaho Code Section 5-214A instructs the court to calculate the five (5) year statute from the maturity date identified in the loan documents. Appellant incorrectly sought to use the date of the alleged accrual of a cause of action to calculate the expiration of the statute.

Alternatively, the case should be remanded for further proceedings because the lower court erred in entering its default against Chase after Chase's representative entered an appearance and having not received the requisite three-day notice of intent to take default required by Idaho Rule of Civil Procedure 55(a)(1). If necessary, other issues, such as adequacy of service of process and whether an acceleration occurred much be addressed.

A. The District Court Correctly Held That the Statute of Limitations to Foreclose the Deed of Trust Has Not Expired.

The district court did not err in denying the Appellant's request for relief and entering judgment because Appellant's claims in its Complaint are contrary to Idaho law.

1. Idaho Code Section 5-214A calculates the statute of limitations from the maturity date listed in the loan documents.

Appellant contends that Borrower's default, and the alleged acceleration of the debt, changed the maturity date for the statute of limitations to no later than April 6, 2011. Appellant's Brief at 12. This argument ignores the plain language, and fails to give meaning to the entire statute, which calculates the statute of limitations from the stated maturity date contained in the loan documents. Courts only look to the accrual of the cause of action when there is no maturity date contained in the loan documents.

This Court, in *Robbins v. County of Blaine*, 134 Idaho 113, 120, 996 P.2d 813, 820 (2000), held: "It is a ***cardinal rule of statutory construction*** that all parts of a statute should be given meaning." Emphasis added. The Court in *Hoskins v. Howard*, 132 Idaho 311, 971 P.2d 1135 (1998), noted as follows:

> Moreover, under this Court's rules of statutory construction, **a statute must be "construed so that effect is given to its**

> **provisions, and no part is rendered superfluous or insignificant**." *Petersen v. Franklin County*, 130 Idaho 176, 181, 938 P.2d 1214, 1219 (1997). The Legislature's intent, when clearly expressed in the language of the statute, must be given effect, and there is "no occasion for construction where the language of a statute is plain and unambiguous." *State v. McCoy*, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996). When interpreting a statute, the Court must first scrutinize the literal words of the statute. *Matter of Permit No. 36-7200*, 121 Idaho 819, 823, 828 Idaho 848, 852 (1992). Words must be given their plain, usual, and ordinary meaning, and "**the statute must be construed as a whole**." *Id.*

Id. at 315 (emphasis added).

Here, Appellant's interpretation of Section 5-214A renders much of the statute meaningless. The statute reads:

> 5-214A. Action to foreclose mortgage on real property. An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage. If the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of the accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness.

I.C. § 5-214A.

Thus, Idaho Code Section 5-214A requires the courts to look to the stated maturity date in the loan documents when determining the statute of limitations. Only in the event the loan documents fail to set forth a maturity date, are the courts to look to the accrual of the cause of action. There is no room to interpret the statute in any other way without rendering much of the statute superfluous, which Appellants seek to do. For this reason alone, the district court's judgment should not be disturbed on appeal.

2. The maturity date is determined by reference to the contract, not by the actions of the parties.

The term "Maturity Date" is a defined term in the Note and the Deed of Trust that contractually binds both the Borrower and Grantors to a defined Maturity Date of August 9, 2037. R. 10, ¶ 2. Appellant's arguments ignore the contractual language and seek to treat the terms "acceleration" and "maturity date" as interchangeable synonyms. Appellant's Brief at 11-12.

However, the actions of the parties cannot modify defined contractual terms. In contract interpretation, contractual language is generally given its ordinary meaning unless defined in the contract, whereas the contractual definition will control. *Swanson v. Beco Constr. Co.*, 145 Idaho 59, 63, 175 P.3d 748, 752 (2007); *Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) ("[T]he parties to a contract are free to define in the contract words that are used therein, even if those definitions vary from the normal meanings of the words.") (citing *Idaho Trust Bank v. Christian*, 154 Idaho 657, 659, 301 P.3d 1275, 1277 (2013) ("Because the word "indebtedness" is defined in the contract, we have no need to address Guarantor's asserted definition of the word "owes."")).

The Note, like the Deed of Trust, specifically define "Maturity Date" as August 9, 2037. R 20. The Note relies upon the definition of "Maturity Date" to define other terms, such as the "Post Draw Period." The term Maturity Date is also used to establish a final payment date, and to limit the date of any future advances. R. 23, ¶ 4. Thus, Appellant's contention that an event of default, allegedly triggering acceleration, can be used interchangeably with the

defined term "Maturity Date" is incongruent with the definition agreed upon by the parties in the loan documents.

In fact, the terms of the Note and Deed of Trust allow for the automatic acceleration of the debt upon default, but also grant the lender the option to forbear from enforcing the Note and Deed of Trust. For example, the Note contains the following provision vesting the Beneficiary with the option to delay enforcement:

> **12. Delay in Enforcement; Corrections.** To the extent permitted by law, we may delay or waive the enforcement of any of our rights under this Agreement without losing that right or any other right and if we delay or waive any of our rights, we may enforce that right at any time in the future without advance notice . . .

R. 25, ¶¶ 11-12.

Other provisions of the loan documents similarly provide that the Beneficiary retains the option to accelerate, enforce, or delay the foreclosure sale. The Deed of Trust contains the following language:

> **Remedies for Default.**
> **(a)** Prompt performance under this Deed of Trust is essential. If Grantor doesn't pay any installment of the Debt on time, or any other event occurs that entitles Beneficiary to declare the unpaid balance of the Debt due and payable in full under the Credit Agreement, the Debt and any other money whose repayment is secured by this Deed of Trust shall immediately become due and payable in full, ***at the option of the Beneficiary***, and the total amount owed by Grantor on the day repayment in full is demanded, including all unpaid interest, will thereafter bear interest at the Rate specified in the Credit Agreement.

R. 11, ¶ 7 (emphasis added).

The Note contains similar language, vesting the Beneficiary with discretion whether to work with the borrower, foreclose, or delay in the enforcement of the remedies provided by the Note and Deed of Trust:

> **11. Termination and Acceleration; Suspension of Advances and Reduction of Credit Limit; Other Remedies**
>
> (a) We ***may*** terminate your Credit Line and require you to pay us the entire outstanding balance of the Credit Line . . . if any of the following happen:
>
> . . .
>
> (ii) You do not meet any of the repayment terms of this Agreement.
>
> . . .
>
> (c) If, at any time, we have the right to terminate your Credit Line under Section VI.11(a) above, ***we may, at our sole option and without prior notice to you***, then or thereafter convert any or all of your Fixed Rate Loans . . . to the balance of your Variable Rate Advances . . .***No exercise of this right to convert and nothing in this Section VI.11(c) shall constitute an election of remedies or a waiver of any of our rights under the remaining provisions of this Section VI.11***, the remainder of this Agreement, the Security Instrument or at law or in equity.
>
> (e) ... Our rights under this Agreement shall be in addition to any other rights we may have under the Security Instrument or at law or in equity.

R. 25, ¶ 11 (emphasis added).

The Borrower also waived the statute of limitations in the Note:

> **13. Presentment.** You waive any statutes of limitations, and any legal requirements of presentment, demand, protest, notice of dishonor and notice of protest of this Agreement.

Id. ¶ 13.

Thus, the loan documents contain language that contradicts the Appellant's argument that the Deed of Trust must be foreclosed within five (5) years of the accrual of a cause of action.

3. Appellant's argument undermines the consistency Section 5-214A provides.

Appellant's interpretation of Section 5-214A removes the clarity and consistency that the statute provides. In so doing, Appellant underestimates importance of the public notice requirements created by the maturity date contained in the loan documents. In *Elliot v. Darwin Neibaur Farms*, 138 Idaho 774, 69 P.3d 1035 (2003), this Court underscored that the maturity date established by the loan documents is used to determine the statute of limitations for the benefit of third parties who may be unaware of the accrual of a cause of action:

> The recorded mortgage, when reviewed in conjunction with the promissory note that the mortgage secured, provides substantial compliance with the ***requirement of notice to the public of the maturity date of the mortgage***, since the two related instruments together provide "the means . . . to ascertain the date of maturity or whether the obligation is not mature."

Elliot v. Darwin 138 Idaho at 783, 69 P.3d at 1044 (citations omitted).

Loan documents provide notice to courts, lenders, borrowers, and third parties of a consistent and reliable maturity date that is uniformly used to calculate the statute of limitations. The statute and loan documents work together to relieve third parties of otherwise necessary, line-by-line due diligence to determine whether a cause of action has accrued and the maturity date has changed. Third parties, especially beneficiaries who purchase residential real

estate loans (i.e., mortgage-backed securities), require consistency in calculating the maturity date and determining whether a deed of trust is still enforceable.[2] Lenders may tolerate various defaults, both minor and significant, for a myriad of reasons. In turn, borrowers benefit from a lender's willingness to forbear from foreclosure while the borrower modifies, refinances, or sells the property.

It follows, that the plain meaning of Idaho Code Section 5-214A is intended to provide clarity and consistency for third parties dealing with real estate loans in Idaho and allows borrowers and lenders to avoid automatic foreclosure.

Appellant seeks to undermine the statute by introducing a floating statute of limitations that is based entirely upon the actions of the parties, which will only serve to create confusion (and litigation) for courts, lenders, borrowers, and third parties. For this reason, the district court's Order Re: Application for Default Judgment and Judgment should not be disturbed on appeal.

The Appellant's position also allows the Borrower to pick and choose which default date is controlling. The Grantors first breached the Deed of Trust in August 2007, when the Grantors violated the Due on Sale provision of the Deed of Trust by transferring title of the

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[2] Maturity dates are commonly used by investors and regulators in determining quality, characteristics, and risk of complex investments. For example, "[t]he Board of Governors of the Federal Reserve System has adopted a risk-based capital measure to assist in the assessment of the capital adequacy of bank holding companies (banking organizations)" by using loan maturity dates in regulating and defining investment portfolios. 12 C.F.R. § Pt. 225, App. A (setting forth capital adequacy guidelines for bank holding companies in various categories of investments by using the maturity dates).

secured property to Appellant. *See* R. 11, ¶ 5 and R. 5-6, ¶¶ 6-9. The Due on Sale provision in the Deed of Trust evidences the accrual of a cause of action, which states:

> 5. **Sale, Transfer or Further Encumbrance of Property.** The Loan is personal to Grantor and the entire Debt shall become immediately due and payable in full upon sale or other transfer of the Property or any interest therein by Grantor, including, without limit, any further encumbrance of the Property.

But Appellant has not argued that the Grantors' violation of this provision changes the Maturity Date. Instead, Appellant chose a different default and accrual date to argue the Maturity Date falls no later than April 6, 2011. Appellants Brief at 6-7.

It follows that Appellant's advocacy for a floating maturity date would cause a chilling effect on a lender's willingness to grant extensions, modifications, forbear from collection, or otherwise accommodate borrowers who experience a minor, or even a significant default. Many borrowers seek to avoid foreclosure through workouts, modification, or government programs such as Freddie Mac's Home Affordable Modification Program ("HAMP") or its Home Affordable Foreclosure Alternatives ("HAFA") program. If a borrower can argue that any event of default serves to reset the maturity date for statute of limitation purposes, lenders may not be willing, or decide they do not have the time they need to participate in such modification programs. In other words, if lenders are faced with an uncertain and ever-changing maturity date, they will be reluctant to work with borrowers experiencing difficulty for fear of the expiration of the statute of limitations. To resolve these concerns, lenders include contractual language that allows for delays, forbearance, and workouts without forfeiting any of their foreclosure rights under the agreement.

Fortunately, the loan documents and Idaho Code Section 5-214A work together to avoid uncertain results. To hold otherwise would cause confusion about the actual maturity date, increase litigation, and incentivize lenders to immediately foreclose its property without attempting to work with borrowers.

B. Idaho Code Sections 6-411 and 6-413 Do Not Allow Lien Stripping in This Action.

Appellant argues that Idaho Code Sections 6-411 and 6-413 require that Chase's Deed of Trust should be removed from title. However, as set forth above, these statutes have no effect because the district court correctly found that the statute of limitations has not run on the Deed of Trust and that a Decree of Quiet Title is not proper.

C. The Lower Court Properly Denied the Appellant's Application for Default.

The central issue in this appeal is the legal issue as to whether an alleged acceleration changes the agreed upon maturity date. However, Appellant makes two procedural arguments relating to the district court's refusal to enter default judgment in its favor. First, Appellant argues that the district court improperly refused to deem the factual allegations contained in its Complaint as admitted. Second, Appellant argues that the Court improperly found the allegations contained in Appellant's Complaint and Application for Entry of Default lacking in foundation. Neither of these issues serves as a valid reason to reverse the district court's decision.

First, again, Appellant argues that the district court was required, but failed, to deem the factual allegations contained in its Complaint as admitted. Specifically, Appellant argues that the district court failed to make a finding that more than five years had passed since

the Credit Line Maturity Date. Appellant argues that the maturity date is a factual issue that should have been deemed admitted. Appellant further argues that it was error for the Court to make the determination that the "maturity date shown on the debt instrument controls." Appellant later concedes in its brief that the district court's conclusion may have been one of law, rather than fact. Appellant's concession is accurate. The district court did not err in refusing to make a finding, based upon the unanswered allegations of the Complaint, that the various acceleration dates reset the maturity date.

While the court must deem factual allegations admitted when entering default, unanswered factual allegations do not change the law. In determining whether to enter a default judgment, the district court looks at the admitted well-pleaded factual allegations and then analyzes whether those allegations state a claim upon which relief may be granted. *Jackson v. Corr. Corp. of Am.*, 564 F. Supp. 2d 22, 27 (D. D.C. 2008). One commentator has noted, "[e]ven after default, however, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit conclusions of law." 10A Charles Alan Wright & Aruther R. Miller, *Federal Practice and Procedure* § 2688.1 (4th ed. 2017). *See also J & J Sports Prods., Inc. v. Romenski*, 845 F. Supp. 2d 703, 705 (W.D. N.C. 2012) (In determining whether to enter judgment on a default, the court must determine whether the well-pleaded allegations support the relief sought; a defendant is not held to admit to conclusions of law).[3] Here, Chase's failure to respond to the conclusory allegations of CMJ's

[3] When Idaho courts have not addressed an issue concerning the Idaho Rules of Civil Procedure, Idaho courts will consider federal case law interpreting the analogous Federal Rule of

Complaint does not automatically mean that CMJ was entitled to the relief that it sought. CMJ's Complaint failed to state a legitimate cause of action because an acceleration is not a maturity date for statute of limitations purposes. The district court acted properly in refusing to find that Chase admitted to conclusions of law.

Second, the court may refuse to enter a default judgment where the allegations in a complaint lack foundation or are merely legal conclusions. Appellant complains that the district court improperly found that the allegations in the Complaint lacked foundation and that CMJ's Affidavit in Support of Application for Entry of Default failed to lay a foundation as to how counsel had personal knowledge about the allegations. "While a defendant who defaults admits all well-pleaded factual allegations, legal conclusions, with no specific factual allegations, are insufficient to support a default judgment." *Taizhou Zhongneng Imp. & Exp. Co., Ltd. v. Koutsobinas*, 509 Fed. Appx. 54, 57 (2d Cir. 2013). Allegations contained in a complaint and application for entry of default must have a reliable foundation. *Educ. Credit Mgmt. Corp. v. Optimum Welding*, 285 F.R.D. 371, 374 (D. Md. 2012). Here, the district court was well within its discretion to find that the allegations contained in Appellant's Complaint and affidavit lacked the necessary foundation and were legal conclusions and were insufficient to form the basis of the entry of a default judgment against Chase. Indeed, Appellant failed to attach a copy of the Quitclaim Deed transferring the real property from the original grantors of the Deed of Trust to Appellant. Appellant failed to attach or verify any evidence showing that Jakobson stopped

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Civil Procedure. *See Sammis v. Magnetek, Inc.*, 130 Idaho 342, 941 P.2d 314 (1997) (where the Idaho Supreme Court relied on federal case law to interpret Rule 4(a)(2), I.R.C.P.).

making payments or that Chase accelerated the Credit Line and Deed of Trust. Without a factual foundation to support these allegations, the district court could not have quieted title to Appellant based on adequate evidence.

D. If the Court Reverses the District Court's Decision Relating to the Statute of Limitations Decision, Remand Is the Proper Remedy.

Again, the central issue in this appeal is the legal issue as to whether an alleged acceleration provides a replacement maturity date to calculate the statute of limitations. If the Court is inclined to agree with Appellant's legal argument on this issue, the proper remedy is to set aside the entry of default and remand the case for further proceedings. These include the following: ***First***, the district court's entry of default was improper because three days' notice was not given as required by Idaho Rule of Civil Procedure 55(a)(1). ***Second***, the entry of default is voidable because Chase was never properly served. ***Third***, the entry of default is inconsistent with the Court's Order Re: Application for Default Judgment. ***Fourth***, because of the noted defects in Appellant's evidence in support of its Application for Entry of Default, the court should hold a hearing to establish the truth of the allegation by evidence.

1. The entry of default was improper.

The court erred in entering its Order of Default because Chase's attorneys appeared in the case prior to the Court's order, but the attorneys had not received three (3) days' written notice of the application for entry of such default as required by Idaho Rule of Civil Procedure 55(a)(1) .

Appellant filed its Motion for Entry of Default on July 27, 2016. R. 29-31. Chase appeared through counsel on August 8, 2016, and served Appellant with a copy of the

appearance. R. 36-38. Chase concurrently filed an Objection to Motion for Entry of Default. R. 39-41. Appellant did not serve a three (3) day notice of an application for entry of default on counsel for Chase as required by Rule 55(a)(1) . On August 16, 2016, the court entered its Order of Default. R. 42-43. Counsel for Chase was not included on the Notice of Service of the court's Order, evidencing the court's error in not recognizing the Notice of Appearance by Chase's counsel. R. 43.

Idaho Rule of Civil Procedure 55(a)(1) is designed to avoid the entry of default in cases where a party has appeared and is prepared to defend, but has not had an opportunity to do so. This rule includes the following language:

> Default ***shall not*** be entered against a party who has appeared in the action ***unless*** that party (or, if appearing by representative, the party's representative) has been served with three (3) days written notice of the application for entry of such default.

IDAHO R. CIV. P 55(a)(1) (emphasis added) .

The Court clearly missed the fact that Chase had appeared in this case prior to entering its Order of Default. Had the court not erred, the Order of Default would not have been entered.

Because of the court's error, the Appellant is not entitled to have its allegations deemed admitted, and at a minimum, the trial court should have an opportunity to rectify this error by setting aside the entry of default if necessary.

2. Good cause exists to set aside the entry of default because Chase was never validly served.

Idaho Rule of Civil Procedure 55(c) provides that the trial court may set aside the entry of default for "good cause shown." If the Court reverses the lower court, the issue of the trial court's entry of default should be remanded to the district court for a determination of whether to set aside the default for good cause because proper service of process of Chase, a non-resident federal chartered bank, is in question.

While the Affidavit of Service is not included in the record[4], Appellant's Affidavit of Counsel represents that Chase was served at one or both of two Boise, Idaho, addresses. Chase, however, is a national association that exists under a federal charter, with its principal place of business located in the City of Columbus, County of Franklin, State of Ohio.[5] Chase is therefore a citizen of Ohio for purposes of determining residence and is not a resident of Idaho, where some of its branches are located. 28 U.S.C. § 1348; *Am. Sur. Co. v. Bank of Cal.*, 133 F.2d 160, 161-62 (9th Cir. 1943); *Horton v. Bank One, N.A.*, 2004 WL 2224867 (5th Cir. 2004); *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001). Thus, the proper method of service of process on a federally chartered bank is to serve the summons and complaint at its principal place of business, or the address contained in its articles of incorporation, neither of which are

[4] As the district court did not enter a judgment against Chase, it had no reason to challenge the method of service by Appellant, so there is no such evidence in the Appellate Record.

[5] The Court may take judicial notice of the address of the principal executive offices on file with the Securities and Exchange Commission, which indicates that the agent for service of process is Thomas F. Godfrey, Vice President and Assistant General Counsel, JPMorgan Chase Bank, National Association, 1 Chase Manhattan Plaza, 25th Floor, New York, NY 10081.

located in Boise, Idaho. Therefore, there exists good cause to set aside the trial court's entry of default for lack of due process and failure of service of process.

3. Good cause exists to set aside the of default because it conflicts with the court's dismissal of the case.

The court's entry of its Order of Default (R. 42-43) not only fails to include any notice to counsel for Chase, but is incongruent with its Order RE: Application for Default Judgment (R. 44-50). Thus, because Judge Greenwood denied the relief requested in Appellant's Application for Default Judgment, the clerk's entry of the Order of Default is in error.

4. The Court should remand so that the district court may hold a hearing to permit appellant to prove its allegations with evidence.

If the Court reverses the decision of the district court the district court should exercise its discretion and conduct an evidentiary hearing. Pursuant to Idaho Rule of Civil Procedure 55(b)(2), "[t]he court may conduct hearings or make referrals when, to enter or effectuate judgment, it needs to: . . . **(C) establish the truth of any allegation by evidence; or (D) investigate any other matter." As outlined above, the allegations contained in Appellant's Complaint and Affidavit in Support of Application for Entry of Default lack foundation and contain legal conclusions. Liability cannot be established through legal conclusions, and the court can accept other evidence to establish the truth of the allegations. *Hmong I v. Lao Peoples Democratic Republic*, Case No. 2:15-cv-2349 TLN AC, n.3 (E.D. Cal. May 17, 2016) (available at 2016 WL 2901562). Where requisite documentary proof of liability is wanting, a plaintiff otherwise entitled to a judgment by default must submit to a proof hearing. *E. Coast News Corp. v. Video Flixx II*, Case No. L-1129-10, slip op. p. 3 (N.J. Super. Ct. App. Div. February 15,

2012) (available at 2012 WL 469734). The decision to enter a default judgment and the decision to conduct a hearing before ruling on a default judgment are committed to the sound discretion of the trial court. Legal conclusions with no specific factual allegations are insufficient to support a default judgment. *Holes & Bahre Paint & Body, Inc. v. Bahre*, 558 B.R. 58, 63 (Bankr. D. Conn. 2016).

As noted by the district court, Appellant's proof in support of its Application for Entry of Default Judgment is conclusory and lacks foundation. Indeed, Chase disputes that it even accelerated the loan when it moved to relief from the bankruptcy stay, rather, it sought relief to have the ability to work out the loan with the debtor.[6] If the Court is inclined to reverse the district court's decision, then it must remand and allow for a hearing.

E. The Court Should Deny Appellant and Award Respondent Attorney's Fees and Costs on Appeal.

Appellant has requested attorney's fees and costs for pursuing this appeal. On March 1, 2017, Governor Otter signed House Bill No. 97, which addresses the Court's holding in *Hoffer v. Shappard*, 380 P.3d 681 (2016), and sets forth a new standard for the award of attorney's fees in civil cases. The bill amends Idaho Code Section 12-121 to state:

> ATTORNEY'S FEES. In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This section shall not alter, repeal or amend any statute that otherwise provides for the award of attorney's fees. The term "party" or "parties" is

[6] *In re Cory Michael Jakobson*, Case No. 10-03337-TLM, Motion for Relief From Stay By JPMorgan Chase Bank, N.A. Successor By Interest to Washington Mutual Bank FA [Doc. 28] p. 1 (Bankr. D. Idaho April 6, 2011).

> defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

The amendment went into effect immediately and the bill states that its purpose is to "reinstate and make no change to Idaho law on attorney's fees as it existed before the Idaho Supreme Court's decision in *Hoffer v. Shappard*." An award of attorney fees under Idaho Code Section 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). As outlined herein, Chase asserts that it should prevail on this appeal, so it has not defended this appeal frivolously, unreasonably, or without foundation. Even if Appellant prevails in this appeal, Chase has set forth arguments relating to genuine issues of law, so attorney's fees are not appropriate. *Chisholm v. Twin Falls Cnty.*, 139 Idaho 131, 136, 75 P.3d 185, 190 (2003).

On the other hand, the Court should affirm the district court's ruling and, in doing so, should award Chase its attorney's fees and costs on appeal pursuant to Idaho Code Section 12-121 and Idaho Appellate Rule 41. Chase asserts that Appellant has asked the Court to ignore the plain meaning of the Idaho Code Section 5-214A, has presented a torturous reading of the words maturity and acceleration, and has wholly ignored the definition of Maturity Date established by the loan documents. The Court should grant Chase its attorney's fees and costs as the prevailing party.

V. CONCLUSION

The Appellant's primary burden is to demonstrate that the district court erred in dismissing its claims against Chase. Appellant has failed to carry this burden by misinterpreting Idaho Code Section 5-214A and by ignoring the contractual definition of Maturity Date to be used in the statute. Having failed to demonstrate that the district court erred in dismissing its claims, this Court should affirm the decisions of the district court.

DATED this 2nd day of March, 2017.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

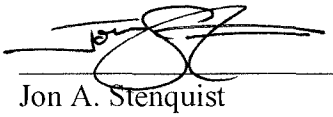
By _____
Jon A. Stenquist – Of the Firm
Attorneys for Defendant/
Respondent JPMorgan Chase Bank, N.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2017, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served by the method indicated below, and addressed to the following:

Matthew T. Christensen
Angstman Johnson
3649 N. Lakeharbor Lane
Boise, ID 83703

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
(X) Overnight Mail
( ) Facsimile



Jon A. Stenquist