STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

CODY BARDEN DANIELS & PALO, INC., dba THE COMMERCIAL AGENCY,

Plaintiff,

vs.

PFP, LLC and OAAS & LANEY, INC., et al.,

Defendant.

Case No. **CV 2011 4969**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION TO SET ASIDE DEFAULT AND JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendants' motion to set aside default. Oral argument on that motion was held February 28, 2012.

Plaintiff Cody Barden Daniels & Palo, Inc., dba The Commercial Agency (hereinafter "Agency"), filed its Complaint for recovery on a promissory note on June 20, 2011. Agency filed an Amended Complaint on June 22, 2011. Agency is an assignee of Umpqua Bank (Umpqua), who was, in turn, assigned the interest in the claim at issue by P&L Land Company, LLC (P&L). Amended Complaint, pp. 1-2. In November 2008, defendants PFP, LLC and Oaas & Laney, Inc., *et al.,* (hereinafter, collectively "PFP") purchased real property located in Twin Falls, Idaho from P&L. Memorandum in Support of Motion to Set Aside Default and Judgment, p. 2. The individually named defendants executed personal guarantees securing the amount owed under the promissory note to Umpqua. Amended Complaint, p. 2. Agency alleges:

> Umpqua Bank (hereinafter "Bank") held a first mortgage on the property identified as the "Pillar Falls Development" near Twin Falls, Idaho. That mortgage, which was in first position, had an original funding amount of approximately $2.94 million.

Plaintiff's Memorandum in Opposition to Motion to Set Aside Default and Default Judgment, pp. 1-2. Agency goes on to note it settled a claim with P&L and thereby gained an $810,000 secured second position on the same property. *Id.,* p. 2. PFP concedes it defaulted on the loan from Umpqua. Memorandum in Support of Motion to Set Aside Default and Judgment, p. 3. PFP disputes that any deficiencies remained after Umpqua's March 23, 2011, trustee's foreclosure sale of the Twin Falls property; "[t]he value of the Pillar Falls property should have satisfied all of the obligations under the Umpqua Bank loan and/or the P&L promissory note. *Id.,* p. 3.

Following the foreclosure and trustee's sale, on June 20, 2011, Agency filed its Complaint in this case seeking the deficiency remaining post-sale. Plaintiff's Memorandum in Opposition to Motion to Set Aside Default and Default Judgment, p. 3. Two days later an Amended Complaint was filed. An Affidavit of Service appears in the court file showing service upon Steven H. Laney on August 21, 2011, Thorval E. Oaas on August 22, 2011, Oaas & Laney Inc. on August 22, 2011, PFP LLC on August 22, 2011, and Deborah Oaas on September 5, 2011. On September 30, 2011, Agency filed its Application for Entry of Default, Affidavit and Motion for Entry of Default and proposed Order and Judgment. On October 5, 2011, this Court signed the proposed Order and Judgment.

On October 17, 2011, counsel for PFP filed a Notice of Appearance. On November 2, 2011, counsel for PFP filed a Motion to Set Aside Default and Judgment. Also on November 2, 2011, PFP filed a Memorandum in Support of Motion to Set Aside Default and Judgment, an Affidavit of T. Erik Oaas in Support of Motion to Set Aside

Default and Judgment, and a Notice of Hearing setting oral argument for such motion on December 7, 2011.

On November 23, 2011, Agency filed Plaintiff's Memorandum in Opposition to Motion to Set Aside Default and Default Judgement [sic], an Affidavit of Leann M. Hume and an Affidavit of Denise Wilkinson.

The December 7, 2011, hearing did not take place. On November 29, 2011, PFP filed an Amended Notice of Hearing setting oral argument for their motion to set aside default for February 28, 2011. On February 22, 2012, five working days before the continued oral argument, PFP filed its Reply Memorandum in Support of Motion to Set Aside Default and Judgment.

PFP admits it learned of the lawsuit on August 22, 2011. Memorandum in Support of Motion to Set Aside Default and Judgment, p. 4. PFP negotiated with Umpqua to repurchase the property and an agreement was reached. *Id.* The parties differ as to what this agreement was. Agency alleges the agreement was for PFP to repurchase the Twin Falls property from Umpqua for $2,350,000 with the transaction to close by the end of September, 2011;

> From the closing, Cody Braden was to be paid $250,000 for the deficiency claim that this lawsuit was intended to cover. The bulk of this money would have been remitted to the Bank from the closing.

Plaintiff's Memorandum in Opposition to Motion to Set Aside Default and Default Judgment, p. 3. PFP makes no reference to the $2.35 million repurchase and claims the lawsuit "would be settled by a $250,000.00 payment to the Collection Agency to be made at the closing of the Pillar Falls purchase." Memorandum in Support of Motion to Set Aside Default and Judgment, p. 4. PFP states it planned to close the repurchase no later than September 29, 2011, but makes no mention of this closing date as being material to the agreement. *Id.,* p. 5. It is PFP's contention that no action was taken to

answer, appear, or otherwise acknowledge Agency's Complaint because of the "course of dealings" between the parties and the parties' "negotiating toward repurchase and settlement." *Id.,* p. 5.

On October 4, 2011, after PFP was unable to obtain financing to repurchase the Twin Falls property and the closing date had passed, PFP contacted counsel for Agency, inquiring "how to handle the present litigation." *Id.* Agency's response was that it had already obtained an Order of Default and Judgment against defendants. *Id.;* Plaintiff's Memorandum in Opposition to Motion to Set Aside Default and Default Judgment, p. 3.

The Court has read the briefing and affidavits submitted by the parties. At the oral argument on PFP's motion to set aside default, held February 28, 2012, counsel for Agency appeared in person and counsel for PFP appeared telephonically. At the conclusion of the hearing, the Court took this matter under advisement.

II. STANDARD OF REVIEW.

The decision to grant or deny a motion to set aside a default judgment, pursuant to either I.R.C.P. 55(c) or 60(b), is committed to the sound discretion of the trial court. *Baldwin v. Baldwin*, 114 Idaho 525, 75 P.2d 1244 (Ct.App. 1988). Denial of an I.R.C.P. 60(b) motion is reviewed for an abuse of discretion. *Alderson v. Bonner*, 142 Idaho 733, 743, 132 P.3d 1261 1271 (Ct.App. 2006). For good cause shown, the court may set aside an entry of default and, if judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b). I.R.C.P. 55(c). Judgments by default are not favored and, generally, the Court is to grant relief from the default in order to reach a judgment on the merits. *Johnson v. Pioneer Title Co. of Ada County*, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct.App. 1983). Where grounds for a motion are non-

discretionary, such as in Rule 60(b)(4) motions, however, the motion is reviewed under the *de novo* standard. *Reinwald v. Eveland,* 119 Idaho 111, 112, 803 P.2d 1017, 1018 (Ct.App. 1991).

III. ANALYSIS.

A. Introduction.

In exercising its discretion in relieving a party from a final judgment or order for mistake, inadvertence, surprise, or excusable neglect, the Court must examine whether the party engaged in conduct, which, although constituting neglect, would nonetheless be excusable because a reasonably prudent person might have done the same thing under the circumstances. *Schraufnagel v. Quinowski*, 113 Idaho 753, 754, 747 P.2d 775, 776 (Ct.App. 1987), *disapproved on other grounds, Golay v. Loomis*, 118 Idaho 387, 393, 797 P.2d 95, 101 (1990). In determining whether the defendant acted with excusable neglect, i.e., acting such that a reasonable person might have done the same thing under the circumstances, mere indifference or inattention does not amount to excusable neglect. *Thomas v. Stevens*, 78 Idaho 266, 271, 300 P.2d 811, 813 (1956); *LeaseFirst v. Burns*, 131 Idaho 158, 162, 953 P.2d 598, 602 (1988). Additionally, "[t]he party claiming excusable neglect must have exercised due diligence in the prosecution of his rights…" *Olson v. Kirkham*, 111 Idaho 34, 38, 720 P.2d 217, 221 (Ct.App. 1986). Fraud sufficient to relieve a party from a final judgment within the meaning of Rule 60(b) goes well beyond interparty misconduct, and will be found only upon "tampering with the administration of justice as to suggest 'a wrong against the institutions set up to protect and safeguard the public…'" *Catledge v. Transport Tire Co., Inc.,* 107 Idaho 602, 607, 691 P.2d 1217, 1222 (1984), *quoting Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 332 U.S. 238, 64 S.Ct. 997, (1944), *rev'd on other grounds,*

Standard Oil Co. of California v. United States, 429 U.S. 17, 97 S.Ct. 31 (1976).

The Court must also determine whether the party seeking to have a default judgment set aside has pled facts which, if established, present a meritorious defense to the action. *Johnson*, 104 Idaho 727, 732, 662 P.2d 1171, 1176. A party seeking to set aside a default judgment must show a meritorious defense and go beyond the mere notice requirements that would have been sufficient if the party had pled them before the default; factual details must be pled with particularity. *Hearst Corp. v. Keller,* 100 Idaho 10, 12, 592 P.2d 66, 68 (1979).

The questions for this Court are whether PFP, in failing to respond to a pending lawsuit, of which it admits it had notice, acted in a way a reasonably prudent person might have under the circumstances; whether fraud, misrepresentation, other misconduct, or other reasons justifying relief existed; whether PFP exercised due diligence in prosecution of its rights; and whether PFP established facts that present a meritorious defense to the action against it, beyond the mere notice requirements.

Before turning to these questions, it is important to discuss what PFP's motion to set aside the default is "not about." The first sentence in PFP's Reply Memorandum in Support of Motion to Set Aside Default and Judgment is:

> Plaintiff responds to Defendants' Motion to Set Aside the Default and Judgment by arguing that "in the interest of justice" this Court should refuse to hear this case on its actual merits and instead allow the default judgment to stand. See *Plaintiff's Memorandum in Opposition to Set Aside Default and Default Judgment* (hereinafter the "*Opposition Brief*") p. 11.

Reply Memorandum in Support of Motion to Set Aside Default, pp. 1-2. The problem with this claim by PFP's counsel is, nowhere in Agency's brief, let alone on page eleven, does Agency ever make the argument that the court should refuse to hear this case on its actual merits. Apparently enamored with this lead off position in its brief, the first

words spoken by PFP's counsel at the February 28, 2012, hearing on its motion to set aside the default were: "Plaintiffs don't want this case to turn on its merits, they want the court to allow the deficiency to stand, and this would give plaintiff a windfall." This case is "not about" Agency not wanting this case to turn on its merits. Agency has never made that argument. "The case not being heard on the merits" is not the result of Agency's briefing or Agency's wishes. "The case not being heard on the merits" **is the result of the inaction taken by PFP**. It is difficult to contemplate a more passive aggressive argument than PFP's inapt choice in placing the blame and responsibility for **PFP's own inaction** upon Agency's resistance to PFP's motion to set aside the default.

PFP's motion to set aside the default must be analyzed under the applicable rules of civil procedure, not analyzed under what PFP claims Agency's wishes to be.

B. PFP Failed to Establish a Right to Relief Under I.R.C.P. 60(b)(1).

PFP identifies its excusable neglect as its reliance upon "the course of dealing" between all parties. Memorandum in Support of Motion to Set Aside Default and Judgment, p. 8. PFP claims that because PFP was negotiating a repurchase with Umpqua, PFP understood it did not need to formally respond to the Complaint. *Id.,* pp. 8-9; Affidavit of Erik Oaas, p. 4, ¶ 23. In response, Agency argues that nothing contained in PFP's correspondence with any party indicated there would not be a need to respond to the lawsuit and, contrary to the statements in Erik Oaas' affidavit, no assurances to that effect were made. Plaintiff's Memorandum in Opposition to Motion to Set Aside Default and Default Judgment, p. 5.

Indeed, no assurances can be found in any of the somewhat disjointed emails provided by Mr. Oaas to the Court. In fact, as noted by Agency, Oaas explicitly states on August 26, 2011, "[w]e can no longer wait to respond to the Summons." Exhibit B to the Affidavit of Erik Oaas. It simply cannot be said that PFP acted as a reasonable

corporation would given the circumstances: PFP failed to timely obtain counsel ("Defendants in the present case were unrepresented by present legal counsel in this matter until after Plaintiff obtained its surprise default Judgment." *Reply Memorandum in Support of Motion to Set Aside Default and Judgment, p. 3.*), PFP waited to contact Umpqua approximately five days *after* closing on the repurchase fell through due to its inability to secure financing, and PFP never requested additional time to respond to the lawsuit informally of opposing counsel or via a motion for enlargement of time with this Court.

PFP argues Agency never provided PFP with any notice of its intention to seek default. Memorandum in Support of Motion to Set Aside Default and Judgment, p. 9; Reply Memorandum in Support of Motion to Set Aside Default and Judgment, p. 3. At oral argument, counsel for PFP stated: "Plaintiff did not provide any notice of intent to take default." When pressed as to "why" PFP was owed a notice of intent to seek default when PFP had yet to file a notice of appearance, counsel for PFP simply stated Agency's failure to provide PFP with a notice of intent to take default was "An indication of their [Agency's] misbehavior." That circular reasoning by PFP's counsel is not persuasive. There is no "misbehavior" by Agency in not providing PFP with a notice of intent to take default if there is no "legal duty" by Agency to provide PFP with a notice of intent to take default. PFP cites no Idaho authority in support of its position that it is entitled to a notice of intent to take default. There is no Idaho authority which would support PFP's claim they are entitled to such notice. Indeed, it is a party's **appearance** which triggers the three-day notice rule of the Idaho Rules of Civil Procedure. In the present case, **neither PFP nor any of the other named and served defendants in this case ever filed an appearance until after** Agency filed its Application for Default.

Like a dog with a bone, even in its Reply Memorandum in Support of Motion to

Set Aside Default and Judgment, PFP refuses to let go of its claim that Agency somehow owed them a duty to provide them with a Notice of Intent to Take Default. Counsel for PFP argues: "Plaintiff served none of the Defendants with a Notice of Intent to Take Default"; (*Reply Memorandum in Support of Motion to Set Aside Default and Judgment, p. 3*) "[w]ithout first providing Defendants a Notice of Intent to Take Default, Mr. Phillips informed Mr. Oaas that not only had Plaintiff already sought entry of default, but Plaintiff had already obtained a default Judgment." *Id.,* p. 4. But nowhere does counsel for PFP ever tie in a legal reason **why** PFP was entitled to a Notice of Intent to Take Default **at a time when no one had ever appeared on behalf of PFP.**

In *Catlege* the Idaho Supreme Court held conduct indicating an intent to defend against an action may constitute an appearance, but taking no action to answer a complaint and failing to retain counsel does not amount to such conduct. *Catlege,* 107 Idaho 602, 606, 691 P.2d 1217, 1221. This Court specifically finds there was no legal duty upon Agency to give PFP notice to Agency's intent to take default. **Solely due to PFP's decision not to file a Notice of Appearance** until October 17, 2011 (two and one half weeks **after** Agency filed for default), Agency had no obligation to refrain from seeking default and judgment following PFP's inability to close the repurchase and, additionally, Agency had no obligation to notify PFP in advance of its seeking to obtain default and judgment. It is PFP's decision not to act and file a notice of appearance that causes Agency to have no duty to provide PFP with a notice of intent to take default.

There is no legal basis for Agency to have provided PFP with notice of intent to take default, and at oral argument, counsel for PFP finally conceded such is the state of the law.

Finally, at oral argument, counsel for PFP claimed that this Court should hold PFP, a Limited Liability Company, to the reasonably prudent **person** standard, not the standard of a reasonably prudent **attorney**, when judging whether the neglect by PFP was excusable. The basis for this claim is at the time of the default, PFP was not represented by counsel. There are two insurmountable flaws in this argument by PFP. First, the Court can find nothing in Agency's briefing where Agency seeks to hold PFP and all the defendants to the standard of a reasonably prudent "attorney." Certainly, this Court is not holding PFP to that standard. The standard for determining excusable neglect in a default situation is "what might be expected of a reasonably prudent person under similar circumstances." *Johnson v. Pioneer Title Co.,* 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983). Second, we need to look at PFP's "circumstances." A Limited Liability Company can only operate through its officers. No one has claimed that any of the officers or any of the individual defendants, collectively or singularly, lacks the ability to read. The Summons in this case (as well as all summons which comply with I.R.C.P. 4(b)(2)) reads:

> You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the plaintiff in the Complaint.

This is a multi-million dollar issue. The bank, Agency, clearly had the upper hand in the fall of 2011 due solely to PFP's failure for quite some time to pay on the very debt PFP was seeking to restructure. PFP was at a disadvantage time-wise, and had a huge amount of money at stake. There is no dispute that PFP and the individual defendants were served with the Complaint and Summons. For PFP and the individual defendants, who have the apparent ability to read the clear language printed on the Summons, to then disregard that clear language on that Summons as to exactly what will happen in

twenty-days if they do not file “an appropriate written response”, on a multi-million dollar transaction in which they have lost the upper hand due to their own **previous** inaction, is to not act as a reasonably prudent person. PFP’s inaction upon being served with the Summons and Complaint, is consistent with their **previous** inaction in not paying on the note. However, in this case, such consistency is not a virtue.

This Court specifically finds PFP and the individual defendants did not in any way act as “what might be expected of a reasonably prudent person under similar circumstances.”

C. PFP Failed to Establish a Right to Relief Under I.R.C.P. 60(b)(3).

As noted *supra,* Rule 60(b)(3) requires more than interparty misconduct to set aside a Judgment for fraud or misrepresentation. PFP alleges Agency “took advantage of” its reliance upon the party’s course of dealings” and improperly sought default. Memorandum in Support of Motion to Set Aside Default and Judgment, p. 10. Agency responds it is entirely unclear how PFP could rely on unspecified and unidentified assurances when Mr. Oaas recognized the need to respond to the Summons in this matter approximately one month before default was sought. Plaintiff’s Memorandum in Opposition to Motion to Set Aside Default and Default Judgment, pp. 7-8.

Ultimately, even if outright assurances had been made by Agency, such would not suffice to provide PFP the relief it seeks. Even perjury or misrepresentation will not amount to “fraud upon the court” as contemplated by Rule 60(b). *Anderton v. Herrington,* 113 Idaho 73, 77 fn. 1, 741 P.2d 360, 364 (Ct.App. 1987), citing *Compton v. Compton,* 101 Idaho 328 P.2d 1175 (1980). For the purposes of Rule 60(b)(3), fraud will only be found where there exist tampering with the administration of justice so as to “suggest a wrong against the institutions set up to protect and safeguard the public.”

Artiach Trucking, Inc. v. Wolters, 118 Idaho 656, 658, 798 P.2d 938, 940 (Ct.App. 1990), quoting *Compton v. Compton,* 101 Idaho 328 334, 612 P.2d 1181 (1980).

In *Atkinson v. Laux,* Bonner County Case No. CV 2008 827, in a February 12, 2010, Memorandum Decision and Order Denying Plaintiff's Motion to Vacate Judgment, this Court wrote:

> *Eliopulos v. Idaho State Bank,* 129 Idaho 104, 922 P.2d 401 (Ct.App. 1996) involved plaintiffs alleging fraud upon the Court via the defendant bank's failure to produce a Bureau of Tobacco and Firearms letter in discovery. The Court of Appeals found plaintiffs contended they, not the Court, were the subject of fraud and misrepresentation, "[t]herefore, their claims should have been analyzed under the standards applicable to an independent equitable action for relief from a fraudulent, not under the standards pertaining to fraud upon the court." 129 Idaho 104, 109, 922 P.2d 401, 406. Ultimately, the Court held plaintiffs' fraud upon the court claims had been properly dismissed below. 129 Idaho 104, 111, 922 P.2d 401, 408. In *Compton,* the Idaho Supreme Court discussed fraud upon the court in detail:
>
> > The term "fraud upon the court" contemplates more than interparty misconduct, and, in Idaho, has been held to require more than perjury or misrepresentation by a party or witness, even where the misrepresentation was made to establish the court's jurisdiction. *Willis v. Willis,* 93 Idaho 261, 460 P.2d 396 (1969). Apparently such fraud will be found only in the presence of such "tampering with the administration of justice" as to suggest "a wrong against the institutions set up to protect and safeguard the public…" *Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238, 246 64 S.Ct 997, 1001, 88 L.Ed. 1250, 1256 (1944) (fraud upon the court found where attorney for patent holder wrote article describing the patent as unique, and arranged for publication in trade journal under name of ostensibly disinterested expert; court relied on article in reaching decision; construing identical language of F.R.C.P. 60(b)); 11 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 2870 (1973).
>
> 101 Idaho 328, 334, 612 P.2d 1175, 1181.

Atkinson v. Laux, Bonner County Case No. CV 2008 827, February 12, 2010, Memorandum Decision and Order Denying Plaintiff's Motion to Vacate Judgment, p. 7.

The evidence before the Court in the instant matter does not include interparty misconduct with regard to any of the plaintiffs misleading any of defendants as to a

need to respond to the Complaint, much less any outright fraud upon the Court.

D. PFP Has Failed to Establish a Meritorious Defense.

In support of its motion to set aside default and Judgment, PFP argues three meritorious defenses exist: (1) Agency cannot produce the promissory note and is not the holder of the note within the meaning of Article 3 of Idaho's Uniform Commercial Code; (2) the property valuation by Umpqua's appraiser far exceeds the amount alleged to be owed and no accounting is provided which would support Agency's arriving at a $99,000 credit bid amount; and (3) the subject property is located in Twin Falls, Idaho and defendants all reside in Ada County, thus Kootenai County is an improper venue. Memorandum in Support of Motion to Set Aside Default and Judgment, pp. 11-13.

Agency responds to PFP's proffered meritorious defenses by positing that the defenses were not properly pled. Plaintiff's Memorandum in Opposition to Motion to Set Aside Default and Default Judgment, p. 8. Agency agrees with PFP that the note is a negotiable instrument, but argues proper assignment of the note from P&L to Umpqua and from Umpqua to Agency is an evidentiary matter and "default judgment obviates the need for submission of evidence in the case." *Id.,* p. 9. Agency next argues PFP has failed to consider the first mortgage obligation to Umpqua in arguing no deficiency should exist and that, after interest, the first mortgage alone amounted to a debt of nearly $4 million; the instant action was for a deficiency on the second mortgage which remained following the trustee's sale. *Id.,* pp. 9-10. Finally, Agency argues an incorrect venue will not deprive the Court of jurisdiction so long as service was proper and improper venue alone is insufficient to attack a judgment collaterally. *Id.,* quoting *Clark v. Atwood,* 112 Idaho 115, 730 P.2d 1035 (Ct.App. 1986).

PFP replies that Agency has misconstrued the meritorious defense standard by arguing the defenses must be pled, stating an affidavit is sufficient to demonstrate a

defendant has alleged facts amounting to a meritorious defense. Reply Memorandum in Support of Motion to Set Aside Default and Judgment, p. 5. Attached to PFP's Reply Memorandum is its proposed Answer to Amended Complaint. PFP's position is entirely correct. The Idaho Court of Appeals has written that a party, in addition to meeting the requirements of Rule 60(b), must also "show, plead or present evidence of facts which, if established, would constitute a meritorious defense to the action." *Ponderosa Paint Mfg., Inc. v. Yack,* 125 Idaho 310, 317, 870 P.2d 663, 670 (Ct.App. 1994). It follows that there exists no strict requirement that meritorious defenses be found in a pleading. And, in any event, in the present case, five days before oral argument, PFP has submitted its, albeit untimely, proposed Answer, as an attachment to its reply brief.

PFP next argues Agency has provided the Court with no evidence of the true fair market value in claiming the deficiency in this matter. Reply Memorandum in Support of Motion to Set Aside Default and Judgment, p. 6. Here, at oral argument and in briefing (Reply Memorandum in Support of Motion to Set Aside Default and Judgment, p. 6) PFP cited Idaho Code § 45-512, an entirely inapplicable code section which establishes the lien priorities asserted against a property.

The issue has been settled by the Idaho Court of Appeals in *Wilhelm v. Johnston,* 136 Idaho 145, 30 P.3d 300 (Ct.App. 2001). In Wilhelm, the Idaho Court of Appeals wrote:

> Even if, on remand, there continues to be a surplus of fair market value over debt, after the district court has added to the secured debt an allowance for reasonable attorney fees, such surplus will not be awardable to the Wilhelms. The rights of the parties upon nonjudicial foreclosure of a deed of trust are governed by Chapter 15, Title 45, of the Idaho Code. We find nothing in that chapter, or elsewhere in Idaho statutory or decisional law, that authorizes a court to award the surplus value to a defaulting debtor when the fair market value of the property serving as security exceeds the amount of the debt secured by a deed of trust. Idaho Code § 45-1507 provides that a debtor is entitled to any

> surplus of *actual proceeds* from a trustee's sale after the expenses of the sale, the obligations secured by the deed of trust, and any subordinate liens have been satisfied, but there is no corresponding provision for an award to the debtor measured by the excess of fair market value over the secured debt. Neither is there any term in the promissory note or deed of trust which provides for such an award. Here, there was no surplus from the trustee's sale, which brought a price of $10,000 on the Johnstons' credit bid. Therefore, there was no basis for an award to the Wilhelms.

136 Idaho 145, 152, 30 P.3d 300, 307. In *Wilhelm,* the District Court found the weight to be given to an appraiser or other witness is a question of fact and the trial court has broad discretion in weighing credibility of witnesses and persuasiveness of all evidence. 136 Idaho 145, 150, 30 P.3d 300, 305. Here, the Court had only Agency's allegation of the fair market value because PFP never responded in any fashion to the Complaint. *See* Amended Complaint, p. 3, ¶ 7. In *Mountain West Bank v. Idaho Fence Company, Inc. et al.,* Kootenai County Case CV 2010 10203, in its August 16, 2011, Memorandum Decision and Order Granting MWB's Motion to Shorten Time; Denying MWB's Motion to Strike; Denying Defendants' Objection to Affidavit of Computation for Judgment; Denying Defendants' Motion for Amendment of Judgment and Denying Motion to Stay Execution, this Court similarly disagreed with a defendant's position that a credit bid fell well below a property's fair market value and determined that any claim of windfall or double recovery was mere speculation. *Mountain West Bank v. Idaho Fence Company, Inc. et al.,* Kootenai County Case No. CV 2010 10203, August 16, 2011, Memorandum Decision and Order Granting MWB's Motion to Shorten Time; Denying MWB's Motion to Strike; Denying Defendants' Objection to Affidavit of Computation for Judgment; Denying Defendants' Motion for Amendment of Judgment and Denying Motion to Stay Execution, pp. 12-13. And, while both parties appear to agree that the promissory note at issue is a negotiable instrument pursuant to Article 3 of the UCC, Idaho case law

would indicate it is not. In *Sirius v. Erickson,* 144 Idaho 38, 156 P.3d 539 (2007), the Idaho Supreme Court determined that, for a promissory note to be a negotiable instrument governed by Article 3 of the UCC, the requirements of I.C. § 28-3-104 must be met. 144 Idaho 38, 41, 156 P.3d 539, 542. That is, the promise or order must be "payable to bearer or to order at the time it is issued or first comes into possession of a holder." *Id.,* quoting I.C. § 28-3-104(1)(a). The promissory note at issue here, like the one in *Sirius*, "lacks the requisite words of negotiability". *See, id.*

Finally, in its Reply Memorandum in Support of Motion to Set Aside Default and Judgment, PFP appears to have abandoned its claimed meritorious defense of "venue." Agency is entirely correct in arguing a default judgment against a corporation cannot be attacked on the ground that an action as brought in an incorrect county or district. In Idaho, as noted by Agency, "Improper venue does not deprive a court of jurisdiction where service has been properly made." *Clark v. Atwood,* 112 Idaho 115, 116, 730 P.2d 1035, 1036 (Ct.Ap. 1986), citing *Bistline v. Eberle,* 85 Idaho 167, 376 P.2d 501 (1962); *Finnell v. Finnell,* 59 Idaho 148, 81 P.2d 401 (1938).

E. PFP's Arguments Regarding Agency's Affidavits.

Without making a motion to strike, PFP in its Reply Memorandum claims "The Affidavits of Denise Wilkinson and LeAnn M. Hume provide no information to the Court demonstrating why the default judgment should not be set aside." Reply Memorandum in Support of Motion to Set Aside Default and Judgment, p. 8. Relevant evidence is admissible and evidence is relevant if it tends to make the existence of any fact of consequence more or less probable. Idaho Rule of Evidence 401. Ms. Wilkinson's affidavit makes clear she never made any statements to PFP indicating there was no need to respond to the lawsuit. Affidavit of Denise Wilkinson, p. 2, ¶ 6. This statement

without question makes a fact in consequence more or less probable.

PFP objects to the Affidavit of LeAnn Hume on the grounds that she testified to matters without personal knowledge of them. Specifically, Ms. Hume testifies that she knew Mr. Oaas knew no repurchase agreement would exist if PFP was unable to fund it because "I talked to him personally about how the settlement would work." Affidavit of LeAnn Hume, p. 2, ¶ 5. This statement makes Ms. Hume's personal knowledge clear on its face. However, she continues, "I am certain he fully understood that if he couldn't get third party funding, there was no deal with the Bank." *Id.* As argued by PFP, this statement is nothing more than speculation and is not considered by the Court. However, such statement is not at all relevant for purposes of Agency's defense of PFP's motion to set aside default.

IV. CONCLUSION AND ORDER.

For the reasons stated above, defendant PFP's motion to have the default judgment set aside must be denied. From a legal standpoint, PFP has not met any of the requirements of I.R.C.P. 60(b)(1) or (3), PFP has not alleged a meritorious defense, and PFP has not proved fraud by Agency upon PFP (and even if they had, fraud upon the Court is what is necessary at this juncture). PFP claims it was negotiating all along with Agency to renegotiate terms on this very large debt, and that is why PFP focused on renegotiating and took its eye off the litigation. However, purely from an equitable standpoint, PFP ignores that it never satisfied what it needed to accomplish in order to renegotiate the debt. Thus, PFP failed in the very effort PFP now claims caused it to be distracted, and at the same time, PFP failed in the defense of this litigation. Both failures can only be laid at the feet of PFP and all the defendants.

IT IS HEREBY ORDERED defendant PFP's motion to set aside the default and default judgment is DENIED.

Entered this 29th day of February, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of February, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Cameron Phillips	208 664-2114	Michael T. Spink, Richard H. Andrus	208 388-1001

_____
Jeanne Clausen, Deputy Clerk