STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

ROLL RANCH CITY, LLC, an Idaho Limited Liability Company, *Plaintiff*, vs. **HIEN D. PHAM, aka HENRY PHAM, and VUI T. PAHM, aka VENESSA PHAM, husband and wife, dba HAPPY NAILS,** *Defendants*.	Case No. **CV 2012 4717** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION TO SET ASIDE DEFAULT, AND DENYING DEFENDANTS' EX PARTE MOTION TO STAY ENFORCEMENT OF JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendants' motion to set aside default and default judgment, and defendants' ex parte motion to stay enforcement of judgment.

Defendants' Motion to Set Aside Default and Default Judgment was filed on September 17, 2012, following entry of default on July 27, 2012, and entry of the Judgment on August 10, 2012. A separate Ex Parte Motion to Stay Enforcement of Judgment was also filed on September 17, 2012. Oral argument on defendants' motions was held on October 22, 2012.

Plaintiff Roll Ranch City, LLC (RRC) is an Idaho Limited Liability Company which owns real property located at 740 Cecil Road, Suite 106, Post Falls, Idaho. Complaint, p. 1, ¶ 1.1. Defendants Hein "Henry" Pham and Vui "Venessa" Pham (Phams) are alleged to be husband and wife and are the lessees of that property, doing business as "Happy Nails." *Id*. On or about December 12, 2010, Phams allegedly entered into a

five (5) year commercial lease agreement with RRC for 740 Cecil Road, Suite 106. Complaint, p. 2, ¶ 2.2. The alleged Lease provided that Phams would pay monthly rent in the monthly amounts of $900.00 in 2011, $990.00 in 2012, $1,035.00 in 2013, $1,080.00 in 2014 and $1,125.00 in 2015. Complaint, p. 2, ¶ 2.3; Exhibit 1, p. 1. In addition to monthly rent, Phams were allegedly also responsible for CAM charges in the amount of $288.00 per month, subject to yearly adjustment, to cover maintenance, real property taxes, repairs and insurance expenses. Complaint, pp. 2-3, ¶ 2.5; Exhibit 1, p. 1. RRC alleges that Phams vacated or abandoned the property and have failed to pay rent since February 2012. Complaint, p. 3, ¶¶ 2.8-2.9.

The Summons and Complaint was filed on June 25, 2012, with an Affidavit of Service for such filed on July 2, 2012, stating that the date of service on Venessa Pham individually and for Henry Pham doing business as "Happy Nails" to be June 28, 2012. Affidavit of Service. Almost a month later, on July 25, 2012, and with an answer never having been filed by Phams, RRC filed an Application for Order of Default Judgment, as well as an Affidavit in Support of Application for Order of Default Entry and Affidavit of Non-Military Service, Majority and Competence. This Court entered an Order for Default Entry on July 25, 2012. RRC filed a Motion for Entry of Default Judgment on August 5, 2012, along with a supporting memorandum, Memorandum of Costs and Fees, Affidavit of Non-Military Service, Majority, and Competence, Affidavit of Last Known Address and Affidavit of Computation. This Court entered a Default Judgment against Henry Pham and Venessa Pham on August 10, 2012. Default Judgment, p. 1.

On August 16, 2012, RRC filed a Motion for Bank Garnishment and Issuance of Writ of Execution, along with a supporting Affidavit. The Motion requested garnishment of Phams' bank accounts, thought to be at JP Morgan Chase Bank, to satisfy the judgment against Phams. Motion for Bank Garnishment, p. 1. This Court entered an

Order for Bank Garnishment and Issuance of Writ of Execution on August 21, 2012, against Phams' bank accounts at JP Morgan Chase Bank. Order for Bank Garnishment, pp. 1-2.

On September 12, 2012, a Claim of Exemption was filed by Venessa Pham and other Third-Party Claims were filed with the Kootenai County Sheriff's Department. Motion Contesting Claim of Exemption of Judgment, Exhibits A, D, F. On September 17, 2012, RRC filed a Motion Contesting the Claim of Exemption of Judgment Debtor and Third-Party Claimants, along with a supporting affidavit from Jason S. Wing. On October, 2, 2012, the day of the hearing, Phams filed their Response to Plaintiff's Motion Contesting Claim of Exemption. After hearing the RRC's Motion Contesting the Claim of Exemption on October 2, 2012, this Court, on October 4, 2012, entered an Order Denying Claims of Exemption of Judgment Debtor and Third-Party Claimants.

Also on September 17, 2012, Phams filed a Motion to Set Aside Default and Default Judgment, with supporting affidavits from Venessa Pham and Henry Pham. No briefing was included with this motion. No notice of hearing was filed at that time. Phams also filed on September 17, 2012, an Ex Parte Motion to Stay Enforcement of Judgment, Writ of Execution for Bank Garnishment, and Release of Funds, with a supporting affidavit from Venessa Pham. Phams also included a proposed Verified Answer and Counterclaim, in which they allege that RRC breached the contract by not properly maintaining the Cecil property for various issues including leaking roof, uneven floor, noxious smells, etc. Proposed Answer to Verified Complaint and Counterclaim. On September 19, 2012, RRC filed its Response in Objection to Defendants' Ex Parte Motion to Stay Enforcement of Judgment. On September 25, 2012, RRC filed Plaintiff's Response in Objection to Defendants' Motion to Set Aside Default Judgment, thus,

briefing the subject. On September 27, 2012, Phams finally filed a Notice of Hearing, setting the hearing on their Motion to Set Aside Default and Default Judgment for November 27, 2012. Then, on October 2, 2012, the same day as the scheduled hearing on RRC's Motion Contesting the Claim of Exemption, without clearing with the Court's Clerk, and without providing opposing counsel sufficient notice, Phams filed a Notice of Hearing setting the hearing on their Motion to Set Aside Default and Default Judgment for that same day, October 2, 2012. The Court refused to hear such on October 2, 2012. On October 3, 2012, counsel for Phams filed a Notice of Hearing scheduling the hearing on their Motion to Set Aside Default and Default Judgment for October 22, 2012. At the hearing on October 22, 2012, counsel for Phams handed the Court a pleading captioned "Response to Plaintiff's Objection to Defendant's Motion to Set Aside Default and Default Judgment", asked that such be filed, and stated that such document was "intended" to be filed and sent to opposing counsel on October 2, 2012, although it was not. This was the first and only briefing filed by Phams in support of their Motion to Set Aside Default and Default Judgment. The Court recessed and read the document, as did opposing counsel. Oral argument was then heard on October 22, 2012. Phams' Motion to Set Aside Default and Default Judgment is now at issue.

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). A district court must examine

each case in light of the unique facts and circumstances presented. *Avondale on Hayden, Inc. v. Hall*, 104 Idaho 321, 326, 658 P.2d 992, 997 (Ct.App. 1983). 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 OF PHAMS' MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT.

A. Henry Pham's Claim of Improper Service Lacks Merit.

Before analyzing Phams' motion to set aside default, the Court must first address Henry Pham's claim that he "…was improperly served with process based on the delivery of the Summons and Complaint to a location he was no longer residing in." Motion to Set Aside Default and Default Judgment, p. 1.

Idaho Rule of Civil Procedure states that a default judgment may be set aside when that judgment is found to be void. I.R.C.P. 60(b)(4). Generally, when a party has not been served with process or was improperly served with process, any judgment against such a party is void. *Thiel v. Stradley*, 118 Idaho 86, 87, 794 P.2d 1142, 1143 (1990). Idaho Rule of Civil Procedure 4(d)(2) states the requirements for service upon individuals. I.R.C.P. 4(d)(2). The Rule states:

> **Service upon individuals.**-Upon an individual other than those specified in subdivision (3) of this rule, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person over the age of eighteen (18) years then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

> Under this rule, service is to be made on the defendant either (1) personally, or (2) by leaving copies of the summons and complaint at his dwelling house or usual place of abode with some person over eighteen residing there, or (3) by delivering a copy of the summons and complaint to "an agent authorized by appointment or by law to receive service of process."

I.R.C.P. 4(d)(2).

The Idaho Supreme Court has held that service upon a defendant's spouse in a bar does not necessarily constitute proper service on the defendant. *Thiel*, 118 Idaho 86, 88, 794 P.2d 1142, 1144. In that case, there was no return of service in the record for the defendant showing service of a copy of the summons and complaint on the defendant either personally or by leaving copies at his dwelling or usual place of abode with some person over the age of eighteen. *Id*. The Court held that unless the defendant's wife was found to be an "agent authorized by appointment or by law to receive service of process" for the defendant, the defendant was not properly served under Rule 4(d)(2), despite the fact that the wife was a co-defendant in the lawsuit. *Id*. The Idaho Supreme Court has stated that the term "resident" connotes a living arrangement with some degree of permanence. *Allstate Ins. Co. v. Mocaby*, 133 Idaho 593, 597, 990 P.2d 1204, 1208 (1999).

Henry Pham was purported to have been served when Venessa Pham was served at the couples' Calamonte address. RRC claims that Henry Pham did not establish a residence in any place other than Kootenai County, Idaho. Plaintiff's Response in Objection to Defendants' Motion to Set Aside Default Judgment, p. 7. In his affidavit, Henry Pham states that when he left in February 2012, he had no intention of returning. Affidavit of Henry Pham, p. 4, ¶ 33. This would appear to be an indication, at least at the time of the service of process on Venessa Pham on June 28, 2012, that Henry Pham no longer considered the Calamonte address to be his home and

therefore not his residence. Thus leaving the complaint and summons with Venessa Pham, though she was over the age of eighteen, would not satisfy I.R.C.P. 4(d)(2) as at the time, Henry Pham did not reside at the Calamonte residence. If this were the case, then Henry Pham also could not have been deemed to have been served by virtue of service on his wife, as held in *Thiel*. However, as RRC points out, Phams' verified "Answer to Verified Complaint and Counterclaim", which was lodged with the Court on September 17, 2012, reads:

> 1.
>
> Defendants admit the allegations in Paragraphs 1.1 and 1.2 of the Verified Complaint that they are husband and wife residing in Kootenai County, Idaho and doing business as Happy Nails and they leased subject property but do not have the information to form an opinon as to Plaintiff's ownership of subject property therefor denies the same.

Answer to Verified Complaint and Counterclaim, pp. 1-2, ¶ 1. As RRC points out, this statement, made under oath by Henry Pham and Venessa Pham, directly contradicts Henry Pham's assertion in paragraph 33 of his affidavit that he established residence in Spokane, Washington (Henry Pham therein states: "It was my intention to never return to the business, my wife or my children. I moved my belongings to my brother's house in Spokane, Washington where I set up my residence", Affidavit of Henry Pham in Support of Motion to Set Aside Default and Default Judgment, p. 4, ¶ 33). Plaintiff's Response in Objection to Defendants' Motion to Set Aside Default Judgment, pp. 6-7. As RRC states, Henry Pham has provided no corroborating evidence of his establishing residence in Washington. *Id.* It is Henry Pham's burden on these motions to set aside and to stay enforcement, and since Henry Pham has submitted an affidavit completely at odds with his Answer to Verified Complaint and Counterclaim, by not providing corroborating evidence of one of those two inconsistent positions, Henry Pham simply has not met his burden.

Finally, as RRC points out, improper service on Henry Pham does not negate the service on Venessa Pham, and thus the default should still be allowed to go forward. *Id.*

B. Introduction of Analysis under I.R.C.P. 60.

The two-prong test for setting aside a default judgment is: 1) the moving party must satisfy at least one of the criteria of Rule 60(b)(1), and 2) the moving party must allege facts which, if established, would constitute a meritorious defense to the action. *Hearst Corp. v. Keller*, 100 Idaho 10, 11, 592 P.2d 66, 67 (1979), *disapproved on other grounds*, 108 Idaho 935, 703 P.2d 699 (1985).

C. Phams Fail to Satisfy at Least One of the Criteria of I.R.C.P. 60(b)(1) by Proving Mistake, Inadvertence, Surprise, or Excusable Neglect.

Idaho Rule of Civil Procedure 60(b)(1) states that, "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . (1) mistake, inadvertence, surprise, or excusable neglect." I.R.C.P. 60(b)(1). 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).

Pro se litigants are held to the same standards and rules as litigants represented by attorneys. *Golay v. Loomis,* 118 Idaho 387, 393, 797 P.2d 95, 101 (1990). But, in determining the Rule 60(b) standard of excusable neglect, the Idaho Court of Appeals has held that the applicable inquiry "is not, strictly speaking, what a lawyer would have done. Rather, we consider whether the movant's conduct was that which 'might be expected of a reasonably prudent person under the same circumstances'". *State Dept. of Law Enforcement By and Through Cade v. One 1990 Geo Metro,* 126 Idaho 675, 681, 889 P.2d 109, 115 (Ct.App. 1195) (quoting *Hearst Corp. v. Keller,* 100 Idaho 10, 11, 592 P.2d 66, 67 (1979)). Ignorance of the law or rules of procedure are generally inexcusable. *Washington Federal Sav. And Loan Ass'n v. Transamerica Premier Ins. Co.*, 124 Idaho 913, 917, 865 P.2d 1004, 1008 (Ct.App. 1993).

The Idaho appellate courts have addressed excusable neglect in a number of cases with varying circumstances. In *Baldwin*, the defendant was informed by his attorney that a bankruptcy stay prohibited him from responding to the plaintiff's amended complaint. 114 Idaho 525, 527, 757 P.2d 1244, 1246. The Court noted that the statements by the plaintiff's attorney may have contributed to this "overly broad view of the scope of the stay." *Id*. The Idaho Court of Appeals held that these circumstances, and the fact that once the defendant learned of the default judgment he was reasonably diligent in his effort to set aside the default judgment, constituted conduct of a reasonably prudent person and so set aside the default judgment. *Baldwin*, 114 Idaho 525, 528, 757 P.2d 1244, 1247. The defendant there had moved to

set aside the default within two weeks of the entry of default judgment. *Baldwin*, 114 Idaho 525, 527, 757 P.2d 1244, 1246.

In *Full Circle, Inc. v. Schelling*, the Court found that where the defendant's wife had lost or misplaced the summons and complaint when she went to mail them to the defendant's attorney, and where the defendant believed that his attorney would have received the paperwork anyway as settlement negotiations had already taken place between the parties' attorneys, the district court did not err in determining that the defendant's failure to answer the Complaint was excusable neglect under I.R.C.P. 60(b). 108 Idaho 634, 637, 701 P.2d 254, 257 (Ct.App. 1985).

In *Gro-Mor, Inc. v. Butts*, the Court held that a defendant's ignorance of the twenty-day time limit in Idaho, though aware of California's thirty-day time limit, was only "mere neglect," not excusable neglect required to set aside a default judgment under I.R.C.P. 60(b). 109 Idaho 1020, 1022-23, 712 P.2d 721, 723-24 (Ct.App. 1985). The default judgment was entered twenty-seven days after the complaint and summons were served on the defendant. *Gro-Mor*, 109 Idaho 1020, 1022, 712 P.2D 721, 723. The Court stated that "[w]e believe that no reasonably prudent person under those circumstances would have stood idly by as did defendant Butts." *Gro-Mor*, 109 Idaho 1020, 1023, 712 P.2d 721-724.

Mere indifference is also not enough to amount to excusable neglect under I.R.C.P. 60(b)(1). *LeaseFirst v. Burns*, 131 Idaho 158, 162, 953 P.2d 598, 602 (1998). The Court has held that excusable neglect exists when a defendant fails to answer an amended complaint when the defendant mistakenly assumed that the complaint pertained to a pending matter already being defended by the product liability insurer. *Herzinger v. Lockwood Corp*., 109 Idaho 18, 19, 704 P.2d 350, 351 (Ct.App. 1985).

However, in *Thomas*, the Court found that a defendant's failure to do anything, despite the ominous character of the warning and demand set forth in a summons and complaint, constitutes inattention and inexcusable neglect. 78 Idaho 266, 272, 300 P.2d 811, 814.

In this case, it would appear that the only explanations given by Phams for their failure to answer the complaint are: Venessa Pham was unfamiliar with the legal system, she relied on her missing husband to give her "that kind of advice and input", she was overwhelmed with her missing husband, running her business and taking care of her children, and finally, that when Henry Pham returned, their marital issues took priority. Affidavit of Venessa Pham, p. 4 ¶ 37. None of these reasons appear to be the sort of reasons that would rise to the level of excusable neglect under I.R.C.P. 60(b)(1) and Idaho case law interpreting that rule. As a pro se litigant at the time of the service, Venessa Pham was responsible for addressing the Complaint, as a reasonably prudent person might. Idaho has held under *Washington Federal* that ignorance of the rules of procedure are generally inexcusable. Similarly, *Gro-Mor* held that a defendant's ignoring of the complaint was inexcusable, as no reasonably prudent person under the circumstances would have stood idly by. The Idaho Supreme Court also held in *Thomas* that a defendant's failure to do anything is inexcusable neglect. Furthermore, the above cited cases where excusable neglect was found there was usually a significant outside influence involved, such as attorney advice or earlier dealings. Therefore, Phams' failure to do anything, despite being served with a Summons and Complaint in June and a default in August, would constitute inexcusable neglect. The Court notes that even after Venessa Pham received the default and informed Henry Pham of the default, Phams continued to do nothing until their bank accounts were garnished pursuant to Court order.

A mistake sufficient to set aside a default judgment must be a mistake of fact and not of law. *Hearst*, 100 Idaho 10, 11, 592 P.2d 66, 67; *LeaseFirst*, 131 Idaho 158, 161, 953 P.2d 598, 601 (1998). Mistaking the law is not sufficient. *Hearst*, 100 Idaho 10, 12, 591 P.2d 66, 68. The Court in *Hearst* held that if the defendant "decided the wording of the summons did not mean what it plainly said, such neglect was not the act of a reasonable person under the circumstances and was therefore not excusable." *Id*. In other words, the mistake cannot be due to willful ignorance. *LeaseFirst*, 131 Idaho 158, 161, 953 P.2d 598, 601. The Court has held that mistake does not exist when the defendant receives conflicting messages from the plaintiff and does not try to reconcile the conflicting messages. *LeaseFirst*, 131 Idaho 158, 162, 953 P.2d 598, 602.

In *Newbold v. Arvidson*, the Idaho Supreme Court held that a defendant's lack of understanding of his legal obligation upon receiving the plaintiff's complaint is a mistake of law. 105 Idaho 663, 664, 672 P.2d 231, 232 (1983), *disapproved on other grounds*, *Shelton v. Diamond Intern. Corp.*, 108 Idaho 935, 703 P.2d 699 (1985). The Court stated that, "[t]he law cannot excuse willful ignorance but imposes an obligation on such a person to seek out assistance of legal counsel." *Id*. In that case, the defendant claimed emotional distress due to his recent divorce and the death of his son as his reasoning for failing to file an answer. *Id*. However, the Court found that the son's death had occurred over two years earlier and that the mere allegation of a recent divorce without additional facts to suggest why a party undergoing a divorce should be excused from attending to legal obligations was not sufficient to amount to setting aside a default judgment. *Newbold*, 105 Idaho 663, 664-65, 672 P.2d 231, 232-33.

In this case, Venessa Pham claims a lack of understanding as a defense to not filing an Answer to the Complaint. However, *Newbold* holds that a defendant's lack of

understanding of his or her legal obligation when served with a complaint is a mistake of law, and under I.R.C.P. 60(b)(1) and *Hearst*, a mistake of law is not sufficient to justify setting aside a default judgment under I.R.C.P. 60(b)(1). This Court is mindful that while the Idaho Appellate Courts have cautioned against upholding default judgments, the case law on what constitutes excusable neglect is clear, even though somewhat harsh in result. This Court finds that Phams as the moving party have failed to meet the first prong to set aside a default, as Phams have failed to satisfy at least one of the criteria of Rule 60(b)(1) by proving mistake, inadvertence, surprise, or excusable neglect. As such, the Court need not address the second prong, and analyze whether Phams have alleged facts which, if established, would constitute a meritorious defense to the action. *Hearst Corp. v. Keller*, 100 Idaho 10, 11, 592 P.2d 66, 67 (1979). The Court will address the second prong as an additional reason for denying Phams' motion to set aside the default and the default judgment, as the Court finds Phams have not satisfied the second prong either.

D. Phams Have Not Established a Meritorious Defense.

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,* 100 Idaho 10, 12, 592 P.2d 66, 68. The conclusion of the party or his attorney that the defendant has a good defense is not enough. *Thomas*, 78 Idaho 266, 271, 300 P.2d 811, 814. The defense matters must be detailed. *Hearst*, 100 Idaho 10, 12, 592 P.2d 66, 8.

There is no implied covenant for a landlord to repair the premises, or to keep them in repair, and the landlord is not bound to repair, unless he has expressly covenanted to do so. *Russell v. Little*, 22 Idaho 429, __, 126 P. 529, 530; *Duthie v. Haas*, 71 Idaho 368, 371, 232 P.2d 971, 973 (1951). However, specific representations are also included. *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 986 P.2d 1019 (Ct.App. 1999). In *Corder*, the landlord's agent made specific representations to the lessee that one of the well pumps would be repaired by the landlord when the lease was agreed to and the lease stated that the landlord would provide wells, pumps and lines necessary to get water to the land. 133 Idaho 353, 355, 986 P.2d 1019, 1021. The landlord then stated during the time of the lease that it would repair the problems, but failed to do so. *Corder*, 113 Idaho 353, 356-57, 986 P.2d 1019, 1022-23. The Court of Appeals held that the landlord breached the contract by not making the repairs as promised. *Corder*, 113 Idaho 353, 361, 968 P.2d 1019, 1027.

In this case, the Lease provides:

> **8.1. Landlord's Repairs**: Landlord shall, at its own expense, keep in good condition and repair the foundations and exterior and bearing walls (excluding surface maintenance such as painting) of the premises. Landlord shall also, subject to reimbursement by Tenant as herein provided, maintain in good repair the roofs, paint the exterior of the premises, and may also, at its election employ a roof and/or air conditioning service company to provide repair and preventative maintenance for the roof and/or HVAC system.. . . Consent will be given only upon Landlord's satisfaction that any repairs necessitated as a result of Tenant's action will be made by Tenant at Tenant's expense and will be made in a manner not to invalidate any guarantee relating to the roof. Landlord shall not be required to make any repairs to the roof unless and until Tenant has notified Landlord of the needs for such repairs and Landlord shall have a reasonable period of time thereafter to commence and complete said repairs.
>
> **8.2. Tenant's Repairs**: Except as expressly provided in paragraph 8.1, Tenant shall be obligated to keep, maintain, and repair the building and other improvements on the premises in good and sanitary order and condition, including, without limitation, the maintenance and repair of the

> store front. . . , doors, window casements, glazing, heating, ventilating, air-conditioning (HVAC) system . . . plumbing, pipes, fire sprinklers, and electrical wiring and conduits. . . . By entering the premises, Tenant shall be deemed to have accepted the premises as being in good and sanitary order, condition, and repair.
>
> **8.3. Alterations**: Tenant shall not make or permit to be made any alterations, additions, or changes (collectively called "alterations") to any part of the premises without first obtaining the written consent of the Landlord. Any alterations for which consent is granted shall be compatible with the design criteria of the Commercial Center and shall be of high quality. . . . Regardless of Landlord's consent, any alterations that require the penetration of the roof, walls, or floor or that affect the mechanical, electrical, or HVAC system shall be installed at Tenant's sole risk, and Tenant shall be liable for all consequential damages resulting from the installation.

Complaint, Exhibit A, p. 7, ¶¶ 8.1-8.3.

Phams' Motion to Set Aside Default simply states that they have a meritorious defense. In Phams' brief, filed the day of the hearing, Phams' attorney simply writes: "In the case at hand, Defendants have disputed that the amounts plead by Plaintiff and have counterclaimed for breach of contract and damages therein as a result of problems are owing to her by Defendant." Response to Plaintiff's Objection, p. 3. Apart from the grammatical problems with that singular sentence, that sentence is conclusory. As this Court set forth above, the conclusion of the party or his attorney that the defendant has a good defense is not enough. *Thomas*, 78 Idaho 266, 271, 300 P.2d 811, 814. The defense matters must be detailed. *Hearst*, 100 Idaho 10, 12, 592 P.2d 66, 8. Phams have failed to show a meritorious defense, at least in briefing. The Court has also reviewed the supporting affidavits from Venessa Pham and Henry Pham. Henry Pham states in his affidavit:

> 8. Prior to entering the subject lease agreement, Steve and Bill (Bill had also made improvements to the Mullan location prior to Happy Nails moving in and the same improvements were made but in that location Bill completed the work) met your affiant and Venessa at the Cecil location and your affiant and Venessa explained the improvements needed, as they had before at the Mullan address, and the parties agreed.

> 10. Further, that before entering into the lease your affiant spoke to Bill about the scope of the work and Bill assured your affiant that the walls would be complete and the floor smoothed.
>
> 12. Bill's construction of the nail salon was substandard. The walls were not properly taped, textured, and finished and the floor properly smoothed in violation of our agreement. Your affiant and Venessa spoke to Bill about the substandard construction and Bill refused to fix the problems. When Bill refused to fix the problems, your affiant spoke to Steve Ridenour but Steve would not require Bill to fix the problems and complete the job.
>
> 15. Further, that after your affiant moved in, a yogurt store also moved in next door and your affiant began smelling what he believed to be sewer gas permeating throughout the salon . . .
>
> 18. Your affiant had Venessa call Dee Ridenour about the problems with regard [sic] the smell of sewer gas.
>
> 19. That RBD sent a plumber to investigate the cause but the cause was never determined and RBD did not fix the problem.
>
> 20. That after we moved into the location your affiant began noticing water pooling in the hallway . . . [s]aid water appeared to be coming from the ceiling because the ceiling tiles were stained and one of the light fixtures had water pooling inside.
>
> 21. That said water intrusion occurred when it would rain leading your affiant to believe that the *roof* had damage and was leaking.
>
> 24. Your affiant had Venessa call Dee to fix the problem and even though someone came out to repair the roof the repair was short lived because water would continue to leak in the same manner thereafter and continued to do so as a result of RBD's failure to repair the roof.

Affidavit of Henry Pham (emphasis added).

As *Russell* states, RRC has no duty to repair the premises, unless the lease so provides. The Lease in this case provides that RRC is responsible for the foundation, exterior and bearing walls, roof and at its election, the HVAC system. Complaint, Exhibit A, p. 7, ¶ 8.1. The Lease provides that Phams are responsible for the store front, doors, window casements, glazing, heating, plumbing, pipes, etc. *Id.,* ¶ 8.2. No express mention is made of the floors, walls or septic system. With regard to

alterations, the Lease simply states that alterations must first be consented to, in writing, by RRC. *Id.,* ¶ 8.3. Based on the language of the Lease and the holdings of *Russell* and *Duthie*, RRC did not have an obligation to repair the septic system because it was not expressly stated in the Lease.

However, with regard to the walls and flooring, it appears at first glance that Phams might fall under the holding in *Corder*, as Henry Pham indicates that the remodel of the floor and walls were part of the agreement prior to the Lease being executed. However, this case is distinguishable from *Corder* because unlike *Corder* where the landlord later agreed to make repairs, RRC never agreed to make subsequent repairs to either the walls or the floor. Alterations, according to the Lease, are the responsibility of the Tenant, the Phams. While "Bill's" workmanship may be grounds for an action in negligence, it does not seem to rise to the level of a breach of contract that would constitute a meritorious defense.

Finally, with regard to the water coming from the ceiling, if there were more detail given by Phams, they might possibly have set forth enough to show a possible breach and meritorious defense. Paragraph 8.1 of the Lease states RRC shall maintain the roofs in good repair. Henry Pham in his affidavit states he believes that the water was the result of a leaky roof, as the water only came in during rainstorms. Henry Pham Affidavit, p. 3, ¶ 21. RRC's failure to repair the leaky roof may be a breach that could be grounds for a meritorious defense. However, Henry Pham's affidavit also states that RRC sent someone to repair the roof and that afterwards it started leaking again. Henry Pham Affidavit, p. 3, ¶ 24. It is not clear from either Henry Pham or Venessa Pham's affidavits that Phams informed RRC again that the roof was leaking, as was required under the Lease. The Phams have simply failed at this point to provide

sufficient detail to prove a meritorious defense, as set forth in *Thomas*, 78 Idaho 266, 271, 300 P.2d 811, 814, and *Hearst*, 100 Idaho 10, 12, 592 P.2d 66, 68, as discussed above.

Abandonment is a means of terminating a lease. *Consolidated AG of Curry, Inc. v. Rangen, Inc.*, 128 Idaho 228, 229, 912 P.2d 115, 116 (1996). Abandonment is defined as an intent to "leave, quit, renounce, resign, surrender, relinquish, vacate . . . [or] discard . . ." *Id*. The Idaho Supreme Court has held that when a tenant repudiates a lease and abandons the premises, the landlord "may take possession of the premises, [and] relet them . . . [D]amages will be the difference between the amount secured on the reletting and the amount provided for in the original lease." *Consolidated AG*, 128 Idaho 228, 230, 912 P.2d 115, 117, quoting *De Winer v. Nelson*, 54 Idaho 560, 567-68, 33 P.2d 356, 359 (1934).

Henry Pham in his affidavit states that on or around February 5, 2012, he rented a U-Haul trailer, packed up the business at the Cecil property and left with the express intention of never returning. Affidavit of Henry Pham, p. 4, ¶¶ 31-33. This would seem to fall under "abandonment" as defined above. Such abandonment is a means of terminating a lease under *Consolidated AG*. Under the Idaho Supreme Court's decision in *Consolidated AG*, when Phams abandoned the property, RRC had a right to take possession of the premises. Thus, Venessa Pham's contention that the lease was ended when she turned the keys over to RRC, is without merit.

It should also be noted that RRC claims that Phams failed to deny Paragraphs 2.8-2.10 of the Complaint and therefore under Rule 8(b) those Paragraphs are deemed admitted. Plaintiff's Response in Objection to Defendants' Motion to Set Aside Default, p. 5. However, on the first page of Phams' proposed Answer to Verified Complaint and

Counterclaim, it states that "Defendants deny each and every allegation in the Verified Complaint except those specifically admitted herein." Answer to Verified Complaint and Counterclaim, p. 1. Thus, by virtue of that language, Paragraphs 2.8 - 2.10, though not specifically denied, were still denied.

The final reason Phams have not established a meritorious defense is they failed to give RRC notice (or at least failed to show or even allege that they gave notice). In order for a tenant to have standing to file an action against a landlord, the tenant must give the landlord three days' written notice, listing each failure or breach and a written demand for performance or cure. I.C. § 6-320(d). If the landlord fails to perform or cure the breach, the tenant may then commence an action against the landlord. *Id*. The Idaho Court of Appeals analyzed this statute in *Action Collection Service, Inc. v. Haught*, 146 Idaho 300, 193 P.3d 460 (2008). The Court held that the written notice requirement is a "minimal burden for a tenant to satisfy before suing a landlord, and it not only benefits landlords but also relieves the court system of unnecessary litigation." *Haught*, 146 Idaho 300, 304, 193 P.3d 460, 464. As such, the Court held that bringing a claim under I.C. § 320(a)(4) triggers the responsibility of providing three days' notice to the landlord pursuant to I.C. § 320(d), regardless of whether the form of the claim is a complaint or a counter-claim. *Id.* Simply informing the landlord verbally does not satisfy the requirement of notice in I.C. § 320(d). *Jesse v. Lindsley*, 149 Idaho 70, 74, 233 P.3d 1, 5 (2008). The notice by the tenant must be in writing. *Id*.

Phams have submitted no proof that they gave RRC any written notice before filing their counterclaim. While both Venessa Pham and Henry Pham state that they informed RRC verbally about the defects of the Cecil property multiple times, it does not appear from their affidavits that they provided written notice to RRC prior to requesting

the Court's permission to file an Answer and Counterclaim. The filing of a counterclaim is the same as the filing of a complaint for purposes of I.C. § 320(d), according to *Lindsley*. Thus, Phams do not have standing to bring a counterclaim against RRC for failure to comply with the written notice requirement of I.C. § 320(d).

IV. ANALYSIS OF PHAM'S EX PARTE MOTION TO STAY ENFORCEMENT OF JUDGMENT.

A. As the Motion to Set Aside Default and Default Judgment is Denied, so Must the Motion to Stay Enforcement of Judgment be Denied.

Idaho Rule of Civil Procedure 62(b) sets forth the rule on stays on judgments. I.R.C.P. 62(b). The Rule states:

> In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of . . . a motion for relief from a judgment or order made pursuant to Rule 60.

I.R.C.P. 62(b).

As discussed above, the Phams do not meet the requirements to set aside a default judgment under Rule 60(b)(1). Therefore the Motion to Stay Enforcement of Judgment must be denied. There are other reasons as well.

B. Phams Fail to Address Adequate Security.

Idaho Rule of Civil Procedure 65(c) requires security for preliminary injunctions and restraining orders. I.R.C.P. 65(c). The rule states:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper for the payment of such costs and damages including reasonable attorney's fees to be fixed by the court, as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

I.R.C.P. 65(c)

The Idaho Supreme Court has held that before an injunction is issued under Rule 65, the giving of security as provided in Rule 65(c) is mandatory, unless the court makes a specific finding based upon competent evidence that no such costs, damages

or attorney's fees will result to the restrained party as a result of a wrongful issuing of the injunction or restraining order. *Hutchins v. Trombley*, 95 Idaho 360, 364, 509 P.2d 579, 583; *Miller v. Board of Trustees*, 132 Idaho 244, 247, 970 P.2d 512, 515 (1998). Setting a bond amount which the court "deems proper" under Rule 65(c) is at the court's discretion. *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 400, 744 P.2d 121, 128 (Ct.App. 1987).

In this case, Phams seek to have the judgment stayed, which amounts to a temporary restraining order and thus fall under Rule 65(c). In order to have a temporary restraining order entered, Phams must provide adequate security, as ordered by the Court. Phams at no time have addressed the adequate security issue.

V. CONCLUSION AND ORDER.

For the reasons stated above, defendants Phams' motion to set aside default and default judgment and Phams' ex parte motion to stay enforcement of judgment must be denied.

IT IS HEREBY ORDERED defendants Phams' Motion to Set Aside Default and Default Judgment is DENIED.

IT IS FURTHER ORDERED defendants Phams' Ex Parte Motion to Stay Enforcement of Judgment is DENIED.

Entered this 7th day of November, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2013, 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 #
Jason S. Wing	208 667-8470	Henry D. Madsen	208 664-6528

_____
Jeanne Clausen, Deputy Clerk