IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PHH MORTGAGE CORPORATION,

Plaintiff-Appellee,

v.

COA Case No. 34,437
Santa Fe County
D-101-CV-2011-03524

LEIGH G. WEBB, AKA L. GEOFFREY WEBB, PATRICIA GAY WEBB AND CHARLES SCHWAB BANK, N.A.,

Defendants-Appellants.

APPELLANTS BRIEF IN CHIEF

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Defendants-Appellants Leigh G. Webb and Patricia Gay Webb (hereinafter "the Borrowers") submit this brief in chief in accordance with Rule 12-213 NMRA.

I. Summary of Proceedings

A. Nature of the case

This case involves foreclosure proceedings between Plaintiff-Appellee PHH Mortgage Corporation (hereinafter "the Bank") and the Borrowers. The Borrowers contend that the Bank did not establish it had standing to bring a foreclosure action against the Borrowers at the time it filed the Complaint because the Bank did not prove it was in possession of the subject note at the time and because it did offer substantial evidence to the District Court that it had the right to enforcement of the subject note through either a proper indorsement or a transfer by negotiation. The Borrowers also contend that they offered substantial evidence to the District Court to warrant setting aside the default judgment entered against them and the order approving sale pursuant to Rule 1-060(B)(6) NMRA. Because the Bank did not satisfy the standing requirements of *Bank of New York v. Romero*, 2014-NMSC-007, 320 P.3d 1 and its progeny, and because the Borrowers established both exceptional circumstances and meritorious defenses to the foreclosure, this Court should reverse the District Court's denial of the Borrowers' motion to set aside default judgment and order approving sale.

B. Course of Proceedings and Disposition in the Court Below

The Bank filed its Complaint to Reform Mortgage and For Foreclosure on November 21, 2011 (hereinafter "Complaint"). [RP 1-32] On April 9, 2012, the District Court issued a Rule 16(B) Scheduling Order Non-Jury (hereinafter "Scheduling Order") which was served on all named parties to this action. [RP 44-48] The Bank moved for default judgment against the Borrowers on May 13, 2013. [RP 71-72] A Default Judgment for Reformation of Mortgage, Decree of Foreclosure, and Appointment of Special Master was entered on May 17, 2013 [RP 86-92] and an Order Approving Sale and Special Master's Report was entered on July 10, 2014. [RP 282-285] On August 8, 2014 the Borrowers filed an Emergency Motion to Set Aside Default Judgment for Reformation of Mortgage, Decree of Foreclosure, and Appointment of Special Master entered on May 17, 2013 and to set aside Order Approving Sale and Special Master's Report entered on July 10, 2014. [RP 288-298] After both parties fully briefed the motion to set aside, a hearing on the matter was held on October 17, 2014 [TR 10/17/14, TR-1—TR-30] and a final Order Denying Defendants' Emergency Motion to Set Aside Default Judgment Entered on May 17, 2013 was entered on January 8, 2015. [RP 342-344] This denial is the basis for the Borrowers' appeal to this Court. A Notice of Appeal was timely filed on January 12, 2015. [RP 345-347]

C. Summary of the Facts Relevant to the Issues Presented for Review

On August 14, 2003, the Borrowers executed a note to Charles Schwab Bank, N.A. (hereinafter "Charles Schwab") in the principal amount of $250,000.00 (hereinafter "the Note"), which was secured by a mortgage recorded on August 28, 2003, as Instrument Number 1286726, in the records of Santa Fe County, New Mexico (hereinafter "the Mortgage"). [RP 1-2, 8-30] On May 27, 2004, the Borrowers granted Charles Schwab a line of credit mortgage against the subject property to secure debt in the principal amount of $119,900.00, which was recorded on May 27, 2004, as Instrument Number 1330218, in the records of Santa Fe County, New Mexico (hereinafter "the Second Loan"). [RP 131, 171-182]

On November 4, 2011, the Mortgage was assigned to the Bank on November 4, 2011 [RP 1-3, 31-32] and on November 21, 2011, Bank filed its Complaint against the Borrowers and also against Charles Schwab based upon its interest in the subject property as a result of the Second Loan. [RP 1-6] In the Complaint the Bank alleged that it was the holder in due course of the Note. [RP 3] Attached to the Complaint is a copy of the Note. [RP 8-10] The attached copy of the Note does not contain any indorsement from Charles Schwab. [RP 8-10] The Complaint and the corresponding attached documents to the Complaint did not contain any other evidence that established how or when the Bank came into possession of the Note nor did they establish any evidence of chain of title from Charles Schwab to any

other entity, including the Bank. [RP 1-32] The Complaint makes no reference to possession of the Note. [RP 1-32]

Prior to the filing of its Complaint, the Bank was the servicer for both the subject loan and the Second Loan [RP 130-133] and had been involved in loss mitigation negotiations with the Borrowers since at least 2009 up to until at least early 2013 [RP 73-79, 248, 250-261, 288, TR 10/17/14, TR- 23].

Upon being served with the Complaint, the Borrowers immediately contacted the Bank in an attempt to respond to the Complaint and to further advise the Bank that they were actively in loss mitigation negotiations at that time. [RP 73-79, 250-261, 289] On April 9, 2012, the District Court issued the Scheduling Order which was served on all named parties to this action and listed the contact information for the Borrowers. [RP 44-48] Based on both the scheduling order from the District Court and correspondence and communications with the Bank, the Borrowers believed they had properly entered this case and properly responded to the Complaint and they continued working with the Bank on loss mitigation efforts. [RP 242-244, 289]

Pursuant to the Scheduling Order, the parties were to conduct a mediation or settlement conference by July 25, 2013 [RP 44-48] and, up until April 25, 2013, the Bank followed deadlines pursuant to the Scheduling Order. [RP 49-52, 111] Despite active loss mitigation efforts with the Borrowers, the Scheduling Order in

place, its previous adherence to the deadlines set forth in the Scheduling Order, and prior to conducting a settlement conference, the Bank moved for default judgment against the Borrowers on May 13, 2013. [RP 71-72] The Motion for Default Judgment did not contain any evidence that established how or when the Bank came into possession of the Note nor did it establish any evidence of chain of title from Charles Schwab to any other entity, including the Bank. [RP 71-72] The motion also makes no reference to possession of the Note at the time the Complaint was filed. [RP 71-72]

Prior to moving for default judgment, the Bank was in possession of contact information for the Borrowers and had had communications with the Borrowers since the filing of its Complaint up until at least a few months prior to moving for default. [RP 73-79, 248, 250-261, 289] In spite of such knowledge of contact information and communications with the Borrowers, the Bank failed to provide notice to the Borrowers that it was proceeding to obtain a default judgment. [RP 44-48, 73-79, 248, 250-261, 289]

Subsequently, a Default Judgment for Reformation of Mortgage, Decree of Foreclosure, and Appointment of Special Master was entered on May 17, 2013 against Borrowers and Charles Schwab. [RP 86-91] The Default Judgment stated the allegations of the Complaint are sustained by the evidence and adopted as findings of fact. [RP 86] The Default Judgment did not contain any evidence that

established how or when the Bank came into possession of the Note nor did it establish any evidence of chain of title from Charles Schwab to any other entity, including the Bank. [RP 86-91] Again, the default judgment also makes no reference to possession of the Note at the time the Complaint was filed. [RP 1-32]

On July 2, 2013, the Borrowers filed, *pro se*, a "Request for Hearing and Case Review" wherein they alleged that they never received notice of the sale, that deadlines were still pending pursuant to the Scheduling Order, and the Borrowers sought relief from the District Court to set aside the Default Judgment and to vacate the planned sale of the subject property. [RP 107-110] On July 24, 2013, the Bank filed its response to the *pro se* pleading wherein it appeared to treat the "Request for Hearing and Case Review" as a Rule 1-060 NMRA motion to set aside and it argued that (1) the Borrowers did not properly file an answer; (2) the Scheduling Order was routinely entered by the district court in all cases regardless of whether an answer was filed or not; (3) despite its prior compliance with deadlines of the Scheduling Order, because no answer to the Complaint had been filed it did not have to hold a mediation session; and (4) the Borrowers did not properly assert a basis under Rule 1-060 to set aside the default judgment. [RP 111-116] Although the *pro se* pleading mentions it sought relief to have the judgment and sale sought aside and despite the Bank's treatment of the pleading as

a Rule 1-060(B) motion to set aside, the record does not show this pleading has ever been ruled on by the District Court.

On October 16, 2013, Charles Schwab filed a motion to set aside the default judgment against it alleging that (1) there was a conflict of interest because, at the time the Bank filed its Complaint, a single law firm improperly represented both the Bank and Charles Schwab in this action; and (2) the Bank, as servicer for the Second Loan, failed to ensure Charles Schwab was represented in this action. [RP 130-131] Charles Schwab's motion to set aside admitted that the Mortgage had been assigned to the Bank on November 4, 2011 [RP 131] but did not contain any evidence or factual support that established how or when the Bank came into possession of the Note nor did it establish any evidence of chain of title of the Note from Charles Schwab to any other entity, including the Bank. [RP 130-200]

Subsequently, on January 31, 2014 the Bank and Charles Schwab entered a Stipulated Order wherein those two parties stipulated that the default judgment was set aside as to only Charles Schwab and that the facts and allegations contained in Counts I and II of the Complaint establish that the Bank is entitled to relief only against the Borrowers. [RP 229-230] The Stipulated Order also specifically stated that "Schwab makes no admissions with regard to the factual allegations in Plaintiff's Complaint." [RP 230] An Order Approving Sale and Special Master's Report was entered on July 10, 2014 wherein the total final judgment amount was

listed as $235,855.23 and the subject property was sold to Charles Schwab who had the highest bid of $370,000.00. [RP 282-285]

On August 8, 2014, the Borrowers moved to set aside the Default Judgment and Order Approving Sale and in their motion to set aside, the Borrowers' specifically raised and pled the following arguments relevant to this appeal: (1) the Bank, as a third-party and not the original lender, failed to establish it had standing to enforce the note and mortgage; (2) exceptional circumstances existed to justify relief from default judgment under Rule 1–060(B)(6). [RP 288-298] The Borrowers' motion also set forth four (4) meritorious defenses: (1) the lack of standing; (2) the lack of sworn statement on the amounts due and owing prevents judgment in favor of the Bank; (3) the Bank failed to establish the conditions precedent in the mortgage have been satisfied; and (4) the Borrowers had potential counterclaims against the Bank based on the discrepancy of the legal descriptions in the Complaint as well other potential violations by the Bank. [RP 288-298]

On August 25, 2014, the Bank filed a response to the motion to set aside wherein it argued the following relevant to this appeal: (1) that Borrowers Motion was untimely because Borrowers were aware of judgment against them soon after the judgment was entered and failed to move to set aside the judgment sooner despite being advised by the District Court to seek advice of counsel; (2) New Mexico law did not require it to provide notice to the Borrowers that it was seeking

judgment against them because the Borrowers never entered an appearance; and (3) the Bank was the original lender. [RP 301-306]

On October 17, 2014, a hearing was held on the Borrowers' motion to set aside and the Borrowers argued that because standing was jurisdictional, it could be raised at any time, and that the Bank had not established that it had standing to enforce the Note at the time it filed the Complaint. [TR 10/17/14, TR-4—TR-7] The District Court found that the issue of standing raised by the Borrowers based on *Romero* was inapplicable to this particular case [TR 10/17/14, TR-28—TR-29] based on the District Court's belief that the original lender, Charles Schwab, who as a party defendant in the matter due to a second lien, admitted in a prior briefing that it assigned the note to the Bank. [TR 10/17/14, TR-5—TR-6, TR-12—TR-13, TR-28-29] Specifically, the District Court stated that Charles Schwab "had admitted that the [N]ote was assigned to the [Bank]" and that there was not a *Romero* issue when the assignor admits and affirms the assignment. [TR 10/17/14, TR-5] The District Court also stated that in its motion to set aside, Charles Schwab "specifically" said that the Bank was the assignee of the "obligation and mortgage." [TR 10/17/14, TR-12—TR-13]

The Borrowers argued that an admission in a pleading does not satisfy the burden the Bank must establish to meet the standing requirements, including chain

of title and the proper testimony and documentation to support such chain of title, set forth in *Romero.* [TR 10/17/14, TR-6—TR-7, TR-9—TR-11, TR-13]

For the first time in the record, the Bank argued at the hearing that the Affidavit of Amounts Due (hereinafter "the Thomas Affidavit") filed on May 13, 2013 established it had standing on November 21, 2011. [TR 10/17/14, TR-19—TR-20] The Thomas Affidavit did not reference the motion for default judgment and nothing contained in it referenced that it was being used in support of the motion for default judgment. [RP 53-70] Additionally, neither the Motion for Default Judgment or the Default Judgment entered in this matter referenced the Thomas Affidavit. [RP 71-72, 86-91] Also, neither pleading stated that the Thomas Affidavit was relied upon for support. [RP 71-72, 86-91] Further, the Thomas Affidavit specifically states that the copy of the Note attached to the Complaint was "a true and correct copy" of the Note. [RP 54] Finally, the Thomas Affidavit also specifically stated that the business records upon which the affiant relied upon in making the affidavit were attached thereto. [RP 53-54] Nothing in the business records attached to the Thomas Affidavit offered any reference, let alone offered any evidence, that established how or when the Bank came into possession of the Note nor was any evidence of chain of title from Charles Schwab to any other entity, including the Bank referenced or established. [RP 53-70]

At the hearing, the Bank also specifically admitted that the copy of the Note attached to the Complaint did not contain an indorsement. [TR 10/17/14, TR-20] The Bank stated that this was because typically the copy taken for the filing of the Complaint was "before it had…the allonge attached." [TR 10/17/14, TR-20] The Bank further stated that the original Note has since been deposited with the court and it also raised, for the first time, that a copy of the Note with the allonge was attached to a notice of deposit of the note that was submitted in support of the judgment. [TR 10/17/14, TR-20]

The Deposit of Original Note was filed on May 29, 2013, after both the Motion for Default Judgment was filed and the Default Judgment was entered and it made no reference to the motion for default judgment and nothing contained in it referenced that it was being used in support of the motion for default judgment that was filed sixteen (16) days prior or the default judgment entered twelve (12) days prior. [RP 92-98] The Motion for Default Judgment nor the Default Judgment entered in this matter referenced the Deposit of Original Note, and neither stated that the Deposit of Original Note, filed after, was relied upon for support. [RP 71-72, 86-91] Further, the Deposit of Original Note was the first and only reference to an allonge in this case outside of the Bank's reference at the October 17, 2014 hearing. [RP 92-98]

The copy of the Note attached to the Deposit of Original Note contained a page entitled "Signature/Name Affidavit" that was not previously a part of the copy attached to the Complaint and the allonge attached contained an undated special indorsement from Charles Schwab to an entity identified as "Cendant Mortgage Corporation." [RP 92-98] Nothing in the allonge attached to the copy of the Note attached to the Deposit of Original Note showed chain of title from "Cendant Mortgage Corporation" to the Bank. [RP 92-98] Further, the allonge attached to the copy of the Note attached to the Deposit of Original Note was executed by a "Tracy Peters" who had the stated title of "Assistant Vice President" of "Cendant Mortgage Corporation" acting as "Authorized Agents" of Charles Schwab. [RP 92-98] Finally, nothing in the allonge attached to the copy of the Note attached to the Deposit of Original Note showed "Cendant Mortgage Corporation" had authority to endorse the note to itself on Charles Schwab's behalf. [RP 92-98]

The District Court ultimately found that the Borrowers failed to prove or present circumstances under *Romero* that would justify setting aside the judgment or order and that *Romero* was inapplicable in this case in the circumstance where the original lender admitted in a pleading that it assigned the subject note to the Bank. [RP 342-344, TR 10/17/14, TR-5—TR-6, TR-12—TR-13, TR-28-29]

Finally, the District Court found that the Borrowers' motion to set aside was untimely and that the Borrowers had failed to present evidence that would justify setting aside either the Default Judgment or Order Approving Sale based on exceptional circumstances pursuant to Rule 1-060(B)(6). [RP 342-344, TR 10/17/14, TR-28—TR-29] Although unclear from the proceedings, it is presumed that the District Court found the motion was untimely based on its interpretation of Rule 1-060(B)(6) as stating that all motions brought under Rule 1-060(B) must be made within a reasonable time and not more than one (1) year of the judgment. [TR 10/17/14, TR-11—TR-12]

With respect to exceptional circumstances, specifically, the District Court stated at the hearing that it didn't see any exceptional circumstances and that the Borrowers did not plead any. [TR 10/17/14, TR-12] The Borrowers argued that exceptional circumstances did exist based on the holding in *Rodriguez v. Conant*, 1987-NMSC-040, 105 N.M. 746, 737 P.2d 531 regarding failure to provide notice to the party that default was being sought when the parties whereabouts was known [TR 10/17/14, TR-24—TR-25] and based on the holding in *Dyer v. Pacheco*, 1982-NMCA- 148, 98 N.M. 670, 651 P.2d 1314 related to large sums of money. [TR 10/17/14, TR-25]

In response to the District Court's inquiry on whether the Bank had conversations with the Borrowers after the Complaint was filed and prior to its

seeking default, the Bank refused to admit or deny whether it or its counsel had such conversations with the Borrowers and instead stated (1) the matter was recently transferred to the Bank's counsel from a different law firm; (2) that conversations occurred prior to the Complaint being filed; (3) that no conversations occurred around the time the default judgment was entered in 2013; and that the Borrowers did not present evidence that the conversations occurred to support the allegations of their motion to set aside. [TR 10/17/14, TR-22—TR-23]

The District Court found that *Rodriguez* was distinguishable from the instant matter because (1) in *Rodriguez* there was multiple defendants and the plaintiff there had failed to advise anyone of it moving for default and thus the court found it was playing fast and loose and the defendants were put in a position where they were going to waive or give up that Rule 1-060(B) right; [TR 10/17/14, TR-24] and (2) in *Rodriguez* there was no communication with the defendants after default was entered but in the instant matter the Borrowers knew that default had been entered and attended copies post-judgment. [TR 10/17/14, TR-25]

The District Court did not address whether the Borrowers established meritorious defenses. [TR 10/17/14, TR-1—TR-30, RP 342-344]

II. Argument

Appellate courts review the district court's denial of a motion to set aside a default judgment for abuse of discretion. *See Magnolia Mountain Ltd. P'ship v. Ski*

Rio Partners, Ltd., 2006–NMCA–027, ¶ 12, 139 N.M. 288, 131 P.3d 675. "In exercising discretion to set aside a default judgment, courts should bear in mind that default judgments are not favored and that, generally, causes should be tried upon their merits." *Springer Corp. v. Herrera*, 1973-NMSC-057, ¶ 8, 85 N.M. 201, 203, 510 P.2d 1072, 1074 *overruled by Sunwest Bank of Albuquerque v. Roderiguez*, 1989-NMSC-011, 108 N.M. 211, 770 P.2d 533; *see also Franco v. Fed. Bldg. Serv., Inc.*, 1982-NMSC-084, ¶ 4, 98 N.M. 333, 334, 648 P.2d 791, 792 (stating that, although the granting of a default judgment rests within the sound discretion of the trial court, defaults are not favored and cases should be tried on their merits). Because trial on the merits is preferred, only "a slight abuse of discretion is sufficient to justify reversal." *DeFillippo v. Neil*, 2002–NMCA–085, ¶ 25, 132 N.M. 529, 51 P.3d 1183. In this case, Borrowers contend that the District Court abused its discretion in refusing to set aside the default judgment because the record shows the Bank did not establish it had standing to bring a foreclosure action against the Borrowers at the time it filed the Complaint and because the Borrowers offered substantial evidence to the District Court to warrant setting aside the default judgment and the order approving sale pursuant to Rule 1-060(B)(6) NMRA based on exceptional circumstances and meritorious defenses. Accordingly, the District Court improperly denied the motion to set aside and this Court should reverse.

A. The District Court's finding that *Bank of New York v. Romero* was inapplicable under the circumstances of this case was not supported by substantial evidence.

1. Preservation

As a preliminary matter, the Borrowers contend that they properly raised the issue of standing in the District Court and preserved for appeal because the Borrowers specifically raised the issue below to the District Court as the main argument of their motion to set aside. [RP 288-298, TR 10/17/14, TR-1—TR-30] In any event, standing is a jurisdictional prerequisite and "the lack of standing is potential jurisdictional defect which may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court." *Romero*, 2014-NMSC-007, ¶ 15 (internal citation and quotation omitted). With respect to the Thomas Affidavit, the Borrowers contend that they properly raised in the District Court and preserved for appeal because the Borrowers attacked the affidavit in the District Court. [RP 288-298, TR 10/17/14, TR-26] In any event, as stated above, standing is a potential jurisdictional defect, cannot be waived, and may be raised anytime and to the extent that the Thomas Affidavit was relied upon for any finding by the District Court on the issue of standing, the Borrowers contend that any failure to fully develop their standing argument, including admissibility of testimony relied upon in an affidavit, before the District Court is immaterial and

the appellate court "may reach the issue of standing based on prudential concerns." *See Romero*, 2014 -NMSC- 007, ¶ 15.

2. Standard of Review

Because the district court determined on the issue that the Bank established standing as a factual matter after a fully brief motion to set aside and after a hearing on oral arguments on the matter, the standard of review for the district court's determination is under a substantial evidence standard of review. *See Romero*, 2014-NMSC-007, ¶ 18 (the standard of review of a trial court's findings of fact will not be disturbed if they are supported by substantial evidence). "'Substantial evidence' means relevant evidence that a reasonable mind could accept as adequate to support a conclusion." *Id.* (internal citation and quotation omitted). Appellate courts "will resolve all disputed facts and indulge all reasonable inferences in favor of the trial court's findings." *Id.* (internal citation and quotation omitted). However, "when the resolution of the issue depends upon the interpretation of documentary evidence," the appellate courts are "in as good a position as the trial court to interpret the evidence." *Id.* (internal citation and quotation omitted); *see also United Nuclear Corp. v. Gen. Atomic Co.*, 1979–NMSC–036, ¶ 62, 93 N.M. 105, 597 P.2d 290 ("Where all or substantially all of the evidence on a material issue is documentary or by deposition, the Supreme Court will examine and weigh it, and will review the record, giving some weight to

the findings of the trial judge on such issue") (internal citation and quotation omitted).

3. None of the Bank's Evidence Demonstrated Standing to Foreclose

Plaintiffs who bring foreclosure actions must demonstrate that they had the right to enforce the note at the time that they filed the foreclosure suit. *Romero*, 2014-NMSC-007, ¶ 17. To establish entitlement to enforce a negotiable instrument as a holder, such as a note, a plaintiff must show that it is: (1) the "holder" of the instrument; (2) a "nonholder" who possesses the instrument and has the rights of a holder; or (3) a person who does not possess the instrument, but is nonetheless entitled to enforce it pursuant to certain provisions of the Uniform Commercial Code (UCC). NMSA 1978 § 55–3–301 (1992). The UCC defines the "holder" of the instrument as "the person in possession of a negotiable instrument that is payable either to the bearer or to an identified person that is the person in possession." NMSA 1978 § 55–3–201(b)(21(A) (2005); *see Romero*, 2014-NMSC-007, ¶ 21. A third party who is not the payee of the instrument "must prove both physical possession and the right to enforcement through either a proper indorsement or a transfer by negotiation." *Romero*, 2014-NMSC-007, ¶ 21.

In the instant case, because the payee of the note was Charles Schwab and not the Bank, the Bank must have established sufficient evidence of how it became

the holder of the Note by either an indorsement or transfer. *See Romero*, 2014-NMSC-007, ¶ 21. Possession alone is insufficient. *Id.*

a. The Bank did not establish it had possession of the note at the time it filed its Complaint.

To establish standing to enforce the subject note, the Bank must have established that on November 21, 2011, it had physical possession of the subject note. *See supra.* However, nothing in the Bank's Complaint, Motion for Default Judgment, Default Judgment, attached documents thereto, or the record established, via any substantial evidence, that the Bank had physical possession of the subject note on November 21, 2011. *See supra.*

Other than the Bank's unsupported allegation in the Thomas Affidavit that the Bank had possession of the note at the time the Complaint was filed, the Bank did not offer any evidence of when it took possession of the Note. Thus it did not establish it had standing because it did not meet the first necessary requirement a third party must show to establish entitlement to enforce a negotiable instrument as a holder---physical possession at the time the Complaint was filed.

To the extent that the District Court's finding that *Romero* was inapplicable in this case with respect to possession was based on the Thomas Affidavit[1], the

[1] The record does not show what the District Court based its finding that *Romero* was inapplicable other than its finding that the admission of Charles Schwab established standing. Moreover, since the Bank only appeared to argue reliance on the Thomas Affidavit for the first time at the October 17, 2014 hearing, the Borrowers are presuming that any finding by the District Court with respect to possession was based on the Thomas Affidavit.

Borrowers contend that such reliance on any testimony in the Thomas Affidavit was in error because the statements made therein were inadmissible.

Pursuant to Rule 11–602 NMRA, a witness or affiant may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Here, the Thomas Affidavit did not establish personal knowledge of the affiant sufficient to support the testimony therein that the Bank was the holder and possessor of the Note on November 21, 2011. Nothing in the Thomas Affidavit established how long the affiant had been employed by the Bank. [RP 53-70] Also, nothing in the Thomas Affidavit established whether the affiant was an employee of the Bank at the time the Complaint was filed. [RP 53-70] *Romero* found that an affidavit submitted by a bank employee who did not work for the bank until after the complaint was filed was inadmissible pursuant to Rule 11-602 NMRA because if the employee was hired after the complaint was filed, it would have no personal knowledge to support testimony that transfer of the subject note to the bank occurred prior to the filing of a foreclosure complaint. *See Romero,* 2014 -NMSC- 007, ¶ 31; *see also Phoenix Funding, LLC v. Aurora Loan Services, LLC*, 2015-NMCA-___, ¶ 19, --- P.3d ----, 2015 WL 5020997 (No. 33,211, Aug. 24, 2015). As such, here it was not established that the affiant had personal knowledge whether the Bank was actually in possession of the Note on the date it filed for foreclosure. Thus, pursuant to

Romero and Rule 11-602 NMRA, the Thomas Affidavit is inadmissible because the affiant did not establish the requisite personal knowledge needed to support any testimony therein regarding the Bank's standing on November 21, 2011. *See also Phoenix Funding*, 2015-NMCA-___, ¶ 19.

Moreover, the only purported basis of knowledge regarding the transfer of the Note is the affiant's review of the "business records." [RP 53-54] However, no such business record itself was offered or admitted as a business records hearsay exception. [RP 53-70]; *See* Rule 11–803(6) NMRA (naming this category of hearsay exceptions as "[r]ecords of a regularly conducted activity"); *see also Romero*, 2014–NMSC–007, ¶¶ 31–32 (holding that a witness's testimony and a witness's affidavit were insufficient to establish the transfer of the note because the witnesses lacked personal knowledge of the note's transfer, and that a witness's reliance on a review of the business records was also insufficient to establish the note's transfer without a specific business record having been offered and admitted under the business records exception to the hearsay rule); s*ee also Phoenix Funding*, 2015-NMCA-___, ¶ 19.

It is well established that an out-of-court statement presented to prove the matter asserted constitutes hearsay and is generally inadmissible. Rule 11–804(B), NMRA; *see also State v. Lopez*, 2011–NMSC–035, ¶ 4, 150 N.M. 179, 258 P.3d 458. Evidence, such as hearsay, which is inadmissible at trial is not admissible in

support of or in opposition to a motion for judgment. *Seal v. Carlsbad Independent School Dist.*, 1993-NMSC-049, 116 N.M. 101, 105, 860 P.2d 743, 747. Thus, because the Thomas Affidavit failed to establish the Bank as the holder of Note due to no business records were offered or admitted as a business records hearsay exception, the testimony within the Thomas Affidavit related to standing is inadmissible testimony, it should not have been relied upon by the District Court to support any finding that the Bank had standing on November 21, 2011.

The lack of *any* relevant evidence in the record with respect to possession other than unsupported, inadmissible, and conclusory affidavit testimony does not lead a reasonable mind to accept as adequate to support a conclusion that the Bank proved it had possession of the Note on November 21, 2011. Therefore the District Court erred in its finding that *Romero* was inapplicable to this case because whether the Bank was in possession of the note on November 21, 2011 was not supported by substantial evidence.

b. The Bank did not establish its right to enforce the note.

Assuming arguendo that the Bank established that it had possession of the note on November 21, 2011, as *Romero* clearly states, possession alone is insufficient for the Bank, as a third party, to establish entitlement to enforce a negotiable instrument. *See Romero*, 2014-NMSC-007, ¶ 21. The Bank still needed to establish that it was the "holder" of the note at the time tis filed its Complaint

because it had the right to enforcement through either (a) a proper indorsement or (b) a transfer by negotiation. *Id.* Here, the Bank did not establish its right to enforce the note through either a proper indorsement or transfer of negotiation.

Other than the Bank's erroneous claim that it was the original lender [RP 305] and the unsupported allegations in both the Complaint [RP 3] and the inadmissible Thomas Affidavit (*supra)* [RP 54] that it was the holder, the record does not show that the Bank proffered any evidence that showed it was holder of the Note on November 21, 2011 through either a proper indorsement or transfer by negotiation. In fact, other than the alleged "admission" found by the District Court from Charles Schwab that it assigned the note to the Bank, nothing in the record established the Bank had standing and, in fact, the record appears to establish otherwise.

i. The Complaint did not establish prima facie evidence of standing.

Here the facts alleged in the Complaint are not only conclusory but also contradictory and do not provide prima face proof the Bank had standing. For instance, the Complaint alleges that it is the holder in due course. [RP 3] In support of this allegation, the Bank attached a copy of an unindorsed note to its Complaint made payable to Charles Schwab, thereby showing on the document's face that Charles Schwab had the right to enforcement. [RP 8-10] Because the Bank so chose to attach exhibits to its Complaint, the exhibits became a part of the

pleading. *See* Rule 1–010(C) NMRA (a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes); *see also Durham v. Guest*, 2009-NMSC-007, 145 N.M. 694, 697, 204 P.3d 19, 22. Because the Note attached to the Complaint is inconsistent with the allegations made in the Complaint with respect to the Bank being the holder in due course, the documents attached control over the allegations. *See Town of Farmington v. Mumma*, 1930-NMSC-076, 35 N.M. 114, 291 P. 290, 290 (where allegations of complaint are at variance with an exhibit attached, the exhibit controls). *Romero* expressly held that an unindorsed note made payable to a third party does not establish standing to foreclose. 2014–NMSC–007, ¶¶ 22, 23; *see also Phoenix Funding*, 2015-NMCA-___, ¶ 17 (finding, under similar facts to the instant matter, that where a third party lender produced an unindorsed copy of note still made payable to original lender at the foreclosure proceeding leading to default judgment as well as a corporate assignment of mortgage assigning the mortgage to the third party lender, neither the unindorsed note, nor the assignment of mortgage is sufficient to establish the third party lender as the holder of the note). Thus, because the facts alleged in the Complaint, pursuant to Rule 1-010, *Durham*, and *Town of Farmington*, show that another party was entitled to enforce the note on November 21, 2011, the Complaint did not offer prima facie proof that the Bank had standing and the

default judgment is void due to lack of jurisdiction. *See generally Phoenix Funding*, 2015-NMCA-___.

ii. The District Court erred in concluding an admission to standing was made.

The District Court erred in basing its finding of the Bank's standing on an alleged admission from Charles Schwab. Nothing in the record shows an admission from Charles Schwab that it assigned the Note to the Bank. Appellate courts review the district court's factual findings only to determine whether substantial evidence exists in the record on which the court could have relied. *Dennison v. Marlowe*, 1989-NMSC-041, 108 N.M. 524, 526, 775 P.2d 726, 728. Here no such substantial evidence exists in the record on which the District Court could have relied to conclude that Charles Schwab admitted it assigned or transferred the Note to the Bank. The pleading the District Court relied on as proof of the admission mentions nothing about transfer or assignment of the Note to the Bank from Charles Schwab and it certainly does not state that the "obligation" was assigned to the Bank as the District Court erroneously stated. [RP 130-200, TR 10/17/14, TR-12—TR-13] Additionally, such a conclusion is in direct contradiction to the record where Charles Schwab clearly stated that it was not making admissions with regard to the factual allegations in [the Bank's] Complaint." [RP 230] Moreover, Charles Schwab was present at the October 17, 2014 hearing on the Borrowers' Motion to Set Aside and indeed had argued

against the Motion primarily on the Bank's behalf despite such default judgment being entered by and in favor of the Bank and not Charles Schwab. At the hearing, Charles Schwab made no such admission that it had transferred or assigned the Note to the Bank and it also failed to corroborate or agree with the District Court's conclusion that it had admitted that it transferred the Note to the Bank. [TR 10/17/14, TR-1—TR-30] Thus there is nothing in the record to support the District Court's finding that Charles Schwab admitted that it transferred or assigned the Note to the Bank and the District Court erred in making such a finding. Therefore, because the record shows that the District Court's finding that *Romero* was inapplicable to the circumstances of this case was based on its erroneous conclusion that Charles Schwab admitted that it transferred or assigned the Note to the Bank, the District Court erred in finding that the issue of standing based on *Romero* was inapplicable in this matter because such a finding was not supported by substantial evidence.

Furthermore, even if Charles Schwab had admitted that it transferred the Note to the Bank, such an admission would not satisfy the jurisdictional prerequisite the Bank, as plaintiff, had to establish standing. Nothing in *Romero* offers any indication that standing of a plaintiff based on a cause of action under the UCC against one defendant can be established by an admission of another defendant, especially when the interests of the defendants are in conflict and the

interest of the defendant making the admission is aligned with the plaintiff.[2] *See generally Romero*. In fact, *Romero* clearly states that the third party claiming to be the holder must prove both physical possession and the right to enforcement and it specifically sets out what is needed to prove such. *See Romero*, 2014-NMSC-007, ¶¶ 17, 21; *see also Bank of New York Mellon v. Singh*, 2015 WL 667847, at *1 (N.M. Ct. App. Jan. 21, 2015) *cert. denied sub nom. Bank Of New York v. Singh*, 2015-NMCERT-003, 346 P.3d 1162 (for the proposition that *Romero* held that for a plaintiff to establish standing to pursue foreclosure of mortgage, *the plaintiff* must establish it had timely ownership of both the note and the mortgage at the time the complaint was filed)(emphasis added). To suggest that the jurisdictional prerequisites to establish standing set forth in *Romero* could be easily established by a simple admission of a third party to the suit is absurd and not supported by any logical interpretation of *Romero* or its progeny.

Here the record is clear that the jurisdictional prerequisites to establish standing set forth in *Romero* were not established by the Bank as it clearly did not proffer any evidence that (1) its standing was established by any alleged admission by Charles Schwab; (2) showed the sequence of chain of title of the Note from Charles Schwab to it; (3), showed that the later produced and undated allonge

[2] Charles Schwab had already successfully bid on the subject property and argued vehemently against the Borrowers on behalf of the Bank at the October 17, 2014 hearing. [TR 10/17/14, TR-1—TR-30]

contained a proper special indorsement from Charles Schwab to Cendant Mortgage Corporation[3]; (4) showed that Cendant Mortgage Corporation had authority from Charles Schwab to specially indorse the Note to itself; (5) showed evidence as to the date when the alleged special indorsement on the allonge occurred; and (6) explained the discrepancies present in the record as to why the Bank previously claimed it was the original lender, why the Thomas Affidavit referred only to the copy of the Note attached to the Complaint as being true and correct and not the copy attached to the Deposit of Original Note which contained the allonge, why the Bank admitted at the hearing that the copy of the Note attached to the Complaint did not contain an indorsement because it was filed "before it had…the allonge attached," and why the Bank was claiming it had standing to foreclose when the evidence it submitted as proof of its standing (the allonge) clearly shows that another entity, and not the Bank, may have standing to foreclose based on a special indorsement. Thus the record is devoid of relevant evidence with respect to the Bank's right to enforce the note other than unsupported, inadmissible, and conclusory statements (contained in the Complaint and the Thomas Affidavit) and the District Court's erroneous conclusion that an admission as to the transfer of the

[3] Where an indorsed note is not produced until after the plaintiff has filed for foreclosure and the indorsement is undated, the indorsement is insufficient to show that the plaintiff was the holder of that note at the time the foreclosure complaint was filed. *Deutsche Bank Nat'l Trust Co. v. Beneficial N.M. Inc.*, 2014–NMCA–090, ¶ 13, 335 P.3d 217, *cert. granted sub nom. Deutsche Bank v. Johnston*, 2014–NMCERT–008, 334 P.3d 425; *Phoenix Funding*, 2015-NMCA-___, ¶ 20.

Note was made. Such lack of relevant evidence in the record does not lead a reasonable mind to accept as adequate to support a conclusion that the Bank proved it had the right to enforce the Note on November 21, 2011. Thus the District Court erred in its finding that *Romero* was inapplicable to this case because whether the Bank had the right to enforce the Note on November 21, 2011 was not supported by substantial evidence.

B. The District Court's finding that that the Borrowers failed to present evidence that would justify setting aside either the Default Judgment Entered on May 17, 2013 or the Order Approving Sale and Special Master's Report Entered on July 10, 2014 based on exceptional circumstances pursuant to Rule 1-060(B)(6) was not supported by substantial evidence.

1. Preservation

The Borrowers contend that they properly preserved the issue that exceptional circumstances existed pursuant to Rule 1-060(B)(6) in the District Court and because the Borrowers specifically raised the issue below to the District Court as the second argument of their motion to set aside. [RP 288-298, TR 10/17/14, TR-1—TR-30]

2. Authorities

One maxim of New Mexico law is that default judgments are not favored and that a case should be decided upon its merits. *See Adams v. Para-Chem Southern, Inc.,* 1998-NMCA-161, ¶ 20, 126 N.M. 189, 967 P.2d 864. Rule 1-055(C) NMRA states, "For good cause shown, the court may set aside an entry of

default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 1-060 NMRA." Pursuant to Rule 1-060(B), a default judgment should be set aside if there are grounds to set aside the judgment and the Defendants have a meritorious defense. *Rodriguez*, 1987-NMSC-040. "Any doubts about whether relief should be granted are resolved in favor of the defaulting defendants because default judgments are not favored in the law" and that "causes should be tried upon the merits." *Dyer*, 1982 -NMCA- 148, ¶ 7. A district court must take as true all genuine factual allegations to support a motion to set aside and the party seeking to set aside judgment is not required to submit any affidavit to support their allegations. *Magnolia Mountain*, 2006 -NMCA- 027, ¶ 21. Rule 1-060(B(6) NMRA provides that a court, in its discretion, can vacate a default judgment any other reason justifying relief from the operation of the judgment, including the existence of exceptional circumstances.

3. The District Court abused its discretion in finding that the Borrowers' Motion to Set Aside under Rule 1-060(B)(6) NMRA was untimely.

Pursuant to Rule 1-060(B)(6) NMRA, a motion to set aside made pursuant to Rule 1-060(B)(6) shall be brought before the court within a reasonable time. The Borrowers contend that they first brought their motion to set aside in their July 2, 2013, *pro se* pleading entitled "Request for Hearing and Case Review" which was only a little over one (1) month after the default judgment was entered. It is well established in New Mexico that *pro se* pleadings should be viewed with tolerance.

See Birdo v. Rodriguez, 1972 -NMSC- 062, 84 N.M. 207, 209, 501 P.2d 195, 197 and filing a motion to set aside a little over 1 month after judgment was entered could hardly be considered unreasonable.

Moreover, the Borrowers also filed their motion to set aside, the denial of which is the subject of this appeal on August 8, 2014, a little over one (1) year after the default judgment was entered and less than one (1) month after the order approving sale was entered. Such timeframes could hardly be considered unreasonable and therefore the District Court abused its discretion in finding that the Borrowers' Motion to Set Aside under Rule 1-060(B)(6) NMRA was untimely.

To the extent that the District Court's finding that the motion was untimely based on the time frame in Rule 1-060(B)(6) NMRA applicable to motions made pursuant to Rule 1-060(B)(1) and not based on the timeframe for motions brought pursuant to Rule 1-060(B)(6) NMRA, such a finding is an erroneous view of the law and is an abuse of discretion. *Rangel v. Save Mart, Inc.*, 2006-NMCA-120, 140 N.M. 395, 402, 142 P.3d 983, 990, as revised (Sept. 25, 2006) (a district court necessarily abuses its discretion when it bases its ruling on an erroneous view of the law). Nothing in Rule 1-060(B)(6) suggests that time limitations applicable to motions made pursuant to Rule 1-060(B)(6) are different in foreclosure proceedings. Thus the order denying the Borrowers' motion to set aside based on it being untimely should be reversed.

4. The District Court abused its discretion in finding that the Borrowers failed to present evidence to support their Motion to Set Aside under Rule 1-060(B)(6) NMRA because the record shows the Borrowers presented substantial evidence to support a finding that exceptional circumstances existed.

A party seeking to set aside a default judgment under Rule 1–060(B)(6) must show the existence of exceptional circumstances and reasons for relief other than those set out in Rules 1–060(B)(1) through (5). *Rodriguez*, 1987-NMSC-040, ¶ 22. The Borrowers specifically raised and argued that exceptional circumstances existed in this case based on the holdings of *Rodriguez* and *Dyer* in both their motion to set aside and at the hearing in support of the motion. [RP 288-298, TR 10/17/14, TR-12—TR-13] Thus the District Court's finding that the Borrowers had not pled any exceptional circumstances [TR 10/17/14, TR-12] was in error and not supported by substantial evidence, particularly where the record establishes the contrary.

In *Rodriguez*, the New Mexico Supreme Court found that exceptional circumstances existed to justify relief from default judgment under Rule 1–060(B)(6) where the party seeking to sustain a default judgment fails to give notice to opponents whose whereabouts were known. *See id.* In the instant matter, the record shows that the Bank had been in communication with the Borrowers since at least 2009, continued to be communication after the Complaint was filed in 2011 up until at least early 2013, and that it knew the whereabouts of the Borrowers. [RP

73-79, 248, 250-261, 288, TR 10/17/14, TR- 23].When the Bank moved for default judgment against the Borrowers in 2013, it knew the whereabouts of the Borrowers and failed to give notice to the Borrowers that it was seeking a default judgment against them. [RP 73-79, 248, 250-261, 288, TR 10/17/14, TR- 23]. Also, the Bank failed to offer any rebuttal evidence that such communications did not occur and that it did not know the whereabouts of the Borrowers when it moved for default and, in fact, even refused to directly answer the District Court's inquiry on the allegations despite its prior admissions that it had communications with the Borrowers between 2011 and 2013. [TR 10/17/14, TR-22—TR-23] Moreover, such allegations were made before the District Court at both the hearing [TR 10/17/14, TR-1—TR-30] and in the motion to set aside [RP 288-298] and the District Court was required to take as true all allegations raised by the Borrowers to support their motion to set aside and the Borrowers were not required to submit any affidavit to support their allegations pursuant to *Magnolia Mountain*. Thus, like it was found in *Rodriguez*, exceptional circumstances existed in the instant matter to justify the District Court setting aside default judgment against the Borrowers under Rule 1–060(B)(6).

To the extent that the District Court's finding that that exceptional circumstances did not exist in this case based on its distinguishing of *Rodriguez* from this case, the Borrowers contend that such a finding was an abuse of

discretion and not supported by substantial evidence because the District Court's analysis of *Rodriguez* was flawed and an erroneous reading and an analysis of *Rodriguez*.

Nothing in *Rodriguez* stands for the proposition the District Court found at the October 17, 2014 hearing where the District Court stated the court in *Rodriguez* found the plaintiff was playing fast and loose and the defendants were put in a position where they were going to waive or give up that Rule 1-060(B) right or that *Rodriguez* somehow differentiates between exceptional circumstances existing in situations where the plaintiff has no communication with the defendants after default was entered but somewhere such exceptional circumstances do not exist in situations where the plaintiff the Borrowers knew that default had been entered and attended copies post-judgment. [TR 10/17/14, TR-12—TR-13] The Borrowers contend that nothing in *Rodriguez* could logically be interpreted to support a conclusion that exceptional circumstances existed there because the court there found the plaintiff was playing fast and loose and the defendants were put in a position where they were going to waive or give up that Rule 1-060(B). *See generally id.*

The Borrowers further contend that *Rodriguez* stands for the proposition that exceptional circumstances may exist in situations where the plaintiff, who has communication with the defendant after the complaint is filed and has knowledge

of the defendant's whereabouts at the time it seeks a default, moves for default without providing notice to the defendant. In fact, *Rodriguez* specifically states that "the failure of the party seeking to sustain a default judgment to give notice to opponents whose whereabouts were known may be a factor supporting the district court's decision to set aside that judgment" based on exceptional circumstances. *Id.* at ¶ 22. Further, nothing in *Rodriguez* logically supports the District Court's interpretation that such circumstances do not exist when the party seeking relief from judgment has communications with the plaintiff after default has been entered. *See generally id.* To the contrary, *Rodriguez* is primarily concerned with the communications that occurred prior to moving for default and the knowledge of the plaintiff about the whereabouts of the defendant prior to moving for default. *Id.* Thus any finding of the District Court that exceptional circumstances did not exist on that was based on its erroneous view of *Rodriguez* is necessarily an abuse of discretion pursuant to *Rangel*. Therefore, because the Borrowers presented substantial evidence to support their contention that exceptional circumstances existed in this case based on the holding in *Rodriguez*, the District Court abused its discretion when it found that the Borrowers failed to present evidence to support their Motion to Set Aside pursuant to Rule 1-060(B)(6) because such a finding was not supported by substantial evidence.

Finally, cases involving large sums of money should not be decided by default judgments, if at all possible. *See United Salt Corp. v. McKee*, 1981-NMSC-052, ¶ 7, 96 N.M. 65, 68, 628 P.2d 310, 313; *Springer Corp.*, 1973-NMSC-057, ¶ 12,; s*ee also Dyer*, 1982-NMCA-148 (finding that the entry of a default judgment for $50,000.00 without any proof of damages was sufficient to show exceptional circumstances existed to warrant setting aside under Rule 1-060(B)(6)). Here, the judgment in this case was $214,987.50, more than four times the amount in *Dyer*. Again, the District Court was required to take as true all allegations raised by the Borrowers to support their motion to set aside and the Borrowers were not required to submit any affidavit to support their allegations. The Bank presented no rebuttal evidence that *Dyer* was inapplicable to this case or that cases involving large sums of money should not be decided by default judgments [RP 301-306, TR 10/17/14, TR-1—TR-30] and the District Court provided no reasoning or explanation that exceptional circumstances did not exist in this case based on a default judgment being entered for a large sum of money without any proof of damages. [RP 342-344, TR 10/17/14, TR-1—TR-30] In fact, Charles Schwab relied on the exact argument in its motion to set aside default judgment and that judgment against Charles Schwab which was ultimately set aside. [RP 130-201] Thus, because the Borrowers presented substantial evidence to support their contention that exceptional circumstances existed in this case to justify setting aside the default

against the Bank based on the discrepancy of the legal descriptions in the Complaint as well other potential violations by the Bank. [RP 288-298]

The finding of a meritorious defense is addressed to the sound discretion of the trial court and in making that determination the court should be liberal. *See Sunwest Bank,* 1989-NMSC-011, ¶ 11. The object of establishing a meritorious defense is to ascertain whether there is some possibility that the outcome of the suit after trial will be different from the result achieved by the setting aside judgment. *See Id.* To satisfactorily advance a meritorious defense, the movant does not need to show by way of verified pleading or by way of affidavit, deposition, or some other form of testimony, the averment of facts which, if proved at the trial, would constitute a defense, but, rather, for purposes of determining the merits of the defense, facts stated in the answer or in the motion to set aside to should be accepted as true. *Id.* at ¶ 13; *see also Magnolia Mountain*, 2006-NMCA-027, ¶ 14.

As stated above, the Borrowers asserted meritorious defenses in their motion to set aside. Based on precedent, the inquiry before the District Court was simple: did the Motion to Set Aside allege facts which, if were to be proven at trial, show a possibility that the outcome of the suit after trial will be different from the result achieved by the default judgment against them? The Borrowers assert that the averred facts in their motion to set aside regarding their meritorious defenses, all of which should have been accepted as true by the District Court, supported that the

Bank would liable to the Borrowers for violations of common law as well as federal and state consumer laws. [RP 288-298] Thus, any amounts alleged owed in the default judgment would be off-set by these violations. Therefore, if the Borrowers were to prove the averred facts to support their defenses and potential counterclaims, there is clearly a possibility that the outcome of this suit after trial would be different from the result achieved by the default, which is a judgment against them. Thus good cause existed to justify the District Court setting aside the judgment entered against the Borrowers as they adequately established they have meritorious defenses. Thus the District Court abused its discretion in finding that the Borrowers failed to present evidence to support their Motion to Set Aside under Rule 1-060(B)(6) NMRA because the record shows the Borrowers presented evidence, facts that must have been accepted as true, to support a finding that meritorious defenses existed.

III. Conclusion

In conclusion, the Bank asked the District Court to decide, and the District Court did decide, during a default judgment proceeding, questionable facts in the Bank's favor when New Mexico jurisprudence clearly mandates that such disputed facts be viewed in a light favorable to the nonmoving party. The record does not establish substantial evidence to support the District Court's finding that the Bank proved it had standing. The District Court abused its discretion in relying upon

inadmissible affidavit testimony and erroneous conclusions of fact that admissions as to standing were made and erroneous conclusions of law that such admissions could be used by a plaintiff to establish standing against an entirely different party. Finally, the District Court abused its discretion in relying upon erroneous conclusions of fact that the Borrowers did not plead the existence of exceptional circumstance to warrant setting aside the default judgment entered against them pursuant to Rule 1-060(B)(6) NMRA admissions as to standing were made and it abused its discretion by relying upon erroneous conclusions of law that exceptional circumstances did not exist and that the motion to set aside was untimely. Thus, this Court should reverse the District Court's denial of the Borrowers' motion to set aside default judgment and order approving sale because said denial was based on an abuse of discretion and its findings were not supported by substantial evidence.

Respectfully Submitted,

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judgment under Rule 1-060(B)(6) due to the large sum of money involved, the District Court abused its discretion when it found that the Borrowers failed to present evidence to support their Motion to Set Aside pursuant to Rule 1-060(B)(6) because such a finding was not supported by substantial evidence.

5. The District Court abused its discretion in finding that the Borrowers failed to present evidence to support their Motion to Set Aside under Rule 1-060(B)(6) NMRA because the record shows the Borrowers presented substantial evidence to support a finding that meritorious defenses existed.

Although the Order Denying Defendants' Emergency Motion to Set Aside Default Judgment Entered on May 17, 2013 did not have a finding on the issue of whether the Borrowers offered evidence of meritorious defenses [RP 342-344], the Borrowers presume that the general language in the Order stating that the Borrowers failed to present evidence under Rule 1-060(B)(6) to support their motion to set aside is also with respect to their meritorious defenses. The Borrowers contend that such a finding was in error as the record clearly shows that the Borrowers presented evidence to establish meritorious defenses. In their motion to set aside, the Borrowers alleged that, in addition to the standing defense discussed *supra*, they had three (3) other meritorious defenses to support their motion to set aside the default judgment pursuant to Rule 1-060 NMRA: (1) the lack of sworn statement on the amounts due and owing prevents judgment in favor of the Bank; (2) the Bank failed to establish the conditions precedent in the mortgage have been satisfied; and (4) the Borrowers had potential counterclaims

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-213(F) NMRA, I hereby certify that the foregoing Brief complies with Rule 12-305 NMRA and also the applicable type-volume limitation set forth in Rule 12-213(F)(3) in that the body of the Brief uses a proportionally-spaced type style or typeface, specifically, Times New Roman and does not exceed eleven thousand (11,000) words as indicated by the word-count total of the word processing system used to prepare the same, which is Microsoft Office Word 2013.

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AFFIDAVIT OF SERVICE FOR BRIEF IN CHIEF IN A CIVIL APPEAL

Eric N. Ortiz, being duly sworn upon his oath or affirmation, hereby declares under penalty of perjury that he mailed the foregoing brief in chief to the following people or entities at the addresses indicated on this day of this 18th of September, 2015.

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