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STATE OF MONTANA
Case Number: DA 18-0691

DA 18-0691

IN THE SUPREME COURT OF THE STATE OF MONTANA

MARK A. STEEN,

Appellant,

-vs-

WOLF CREEK INVESTMENTS, LLC and
QUARRY BAY CAPITAL, LLC,

Appellees.

On Appeal from the First Judicial District Court, Lewis and Clark County
District Court Judge Michael F. McMahon

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I. STEEN'S APPEAL IS TIMELY.

Quarry Bay claims this Court's appellate rules required Steen to appeal the Order Setting Aside Default Judgment within thirty days. Quarry Bay Ans. Br. ("Ans. Br.") at 18, 21-27. This argument is specious because of the finality requirements of the Rules of Appellate Procedure. The reason for requiring finality is to avoid piecemeal litigation and inconsistent results. *See e.g., Farmers Union Mut. Ins. Co. v. Bodell*, 2008 MT 363, ¶26, 346 Mont. 414, 197 P.3d 913 ("[T]his Court discourages premature and piecemeal interlocutory appeals. We have done so to 'support judicial economy and efficiency and uphold the integrity of the trial court's process.'"). Quarry Bay does not claim the Order was a final order. Rather, it claims that the appellate rules carve out a specific exception for such non-final orders. Steen disagrees.

In claiming the appeal is untimely, Quarry Bay relies on Rules 4(5)(a)(iv)(E) and 6(3)(a), M.R.App.P. Ans. Br. at 22-24. Rule 4(5)(a)(iv)(E) states:

> Under rule 60(b) for relief from a judgment or order, the time for appeal for all parties shall run from the entry of the order granting or denying any such motion...

At first blush this rule may seem to give support to Quarry Bay's position, however, reading the rules as a whole reveals that the reference to the time period to file an appeal after a ruling on a Rule 60(b) motion is referring to a motion which postpones

the finality of an otherwise final judgment. It is Rule 6 that governs the application of the other rules.

Importantly, Rule 6(3), M.R.App.P., states:

> ... In civil cases, an aggrieved party may appeal from the following, ***provided that the order is the court's final decision on the referenced matter***:
>
> (a) *From an order made after* ***final judgment****, including an order vacating or refusing to vacate a default judgment, and an order granting or denying a motion for new trial or to alter or amend a judgment;...*

(Emphasis added). Rule 4(1)(a), M.R.App.P., defines when a judgment is final:

> ***Final judgment***. A ***final*** judgment conclusively determines the rights of the parties and ***settles all claims in controversy in an action or proceeding, including any necessary determination of the amount of costs and attorney fees awarded or sanction imposed.***

(Emphasis added). Thus, the long-standing prohibition of appeal on non-final judgments is not changed by these rules.

Just in case what is appealable is not clear, Rule 6(5)(a), M.R.App.P., provides a non-exclusive list of orders and judgments that are ***not*** appealable, including any order or judgment "which adjudicates fewer than ***all*** claims as to ***all*** parties, and which leaves matters in the litigation undetermined." (Emphasis added). An order which adjudicates fewer than all the claims as to all the parties may only be appealed if properly certified pursuant to Rule 54(b), M.R.Civ.P. *See* Rule 6(6), M.R.App.P. This is consistent with the definition of "final judgment" in Rule 4, M.R.App.P., as

one which "settles all claims in controversy." *See e.g., Kraft v. High Country Motors, Inc.*, 2012 MT 83, ¶22, 364 Mont. 465, 276 P.3d 908 (default against two of three defendants required certification as final under M.R.Civ.P. 54(b)).

Importantly, Steen's Amended Complaint stated four claims for relief against Wolf Creek. (Appx. 6, ¶¶15-26, 54-65, MAS 25-27, 30-31). The December 18, 2017, Order dealt only with the claims against Quarry Bay and did not address the claims against Wolf Creek. Absent an avoidance of the transfer to Wolf Creek, the avoidance of the Quarry Bay mortgage by default was of no avail to Steen as a creditor to apply the property to his judgment. The December 18, 2017, Order was not a final judgment in the case.

Furthermore, the cases cited by Quarry Bay in support of this argument are distinguishable.[1] Quarry Bay does not cite any case where one of multiple parties was defaulted and a failure to appeal within thirty days after a Rule 60 determination was found to be jurisdictional. Rather, it cites cases noting that procedurally they were filed within thirty days of the entry of a Rule 60 motion. Importantly, Quarry Bay recognizes that *Rennick v. Security Mortgage*, 2000 MT 245N, 302 Mont. 543, 12 P.3d 429, and *Brown v. Gehring*, 2018 MT 135N, 392 Mont. 554, 420 P.3d 510,

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[1] Quarry Bay misidentifies the case of *Karlen v. Evans*, 276 Mont. 181, 915 P.2d 232 (1996), as a default judgment case. It is not. In *Karlen*, plaintiffs' case was dismissed for failure to prosecute, plaintiffs moved to set the dismissal aside pursuant to Rule 60(b)(6), M.R.Civ.P., which was granted by the lower court and then affirmed on appeal. *Id.*, 276 Mont. at 183, 915 P.2d at 235.

are non-citable memoranda decisions. Ans. Br. at 26, fn 2.[2] But even if these cases served as precedent, they are distinguishable because they involved single or aligned parties such that the Rule 60 motion dealt with all claims (i.e., a denial of the motion to vacate the default judgment would resolve all the issues between the parties and end the case).

Finally, the grammatical syntax of the rule supports Steen's interpretation. Quarry Bay limits its analysis to construing the following sentence from Rule 6(3)(a), M.R.App.P.:

> ...in 'civil cases, an aggrieved party may appeal from an order made after final judgment, including an order vacating or refusing to vacate a default judgment...'

Ans. Br. at 23. Quarry Bay claims this sentence must be construed to require immediate interlocutory appeal of a non-final order vacating a default judgment, or it would be meaningless. *Id.*

Analyzing the grammatical syntax of the sentence defeats this argument. The word "order" is a noun. "[M]ade after final judgment" is an adjective clause modifying the word "order"—describing the type of order that may be appealed, and

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[2] It is ironic Quarry Bay criticizes Steen for relying on a quote in *Rennick* in which this Court cited to the case of *Roberts v. Empire Fire and Marine Insurance Company*, yet then tries to use *Rennick* in support of its own argument. See Ans. Br. at 17, 26 fn 2. Furthermore, in response to Quarry Bay's criticism, it is true Steen mistakenly failed to indicate the quotation came from *Rennick*. However, the simple fact remains that *Roberts* is legal precedent of this Court and clearly held: "[b]ecause the law and facts so clearly support a default judgment, we hold that the District Court manifestly abused its discretion in setting the default judgment aside." *Roberts*, 278 Mont. 135, 141, 923 P.2d 550, 554 (1996).

limiting it to such an order. The word "including" is, by definition, non-inclusive. As Merriam-Webster online says, "including" means "to have (someone or something) as part of a group or total: to contain (someone or something) in a group or as a part of something: to make (someone or something) part of something." "include (verb)", Merriam-Webster.com 2019, https://meriam-webster.com (June 5, 2019). So "including" has as part of its definition the fact that it is not all inclusive.

What group is being elucidated in this sentence by use of the word "including"? Those orders "made after final judgment." Final judgments resolve all causes and claims against all parties. Quarry Bay's argument that the particular in a statute governs over the general or that the language is meaningless is therefore a non-sequitur. In this sentence of Rule 6(3), M.R.App.P., the particulars are merely examples of the types of orders that may be appealed after final judgment has entered.

II. QUARRY BAY'S FACTUAL STATEMENT MUST BE CLARIFIED.

Quarry Bay claims "it had nothing to do with the underlying dispute between Steen and Heard." Ans. Br. at 12. This statement assumes the separate existence of Quarry Bay and ignores the very basis of the claim made in this case that Quarry Bay is the alter-ego of Heard—his instrumentality. *See e.g.*, *Berlin v. Boedecker*, 268 Mont. 444, 458, 887 P.2d 1180, 1188-1189 (1995) (An alter ego is a subterfuge and legally indistinguishable from its principal.).

Quarry Bay also points to the Declaration of Tom Sharp to "prove" that Quarry Bay is engaged in legitimate business and states "there has been no evidence that Quarry Bay, Tom or Fred Sharp, or any of Quarry Bay's management team is involved in any illegal or unethical activities." Ans. Br. at 14. Opposing this statement is the affidavit of Fred Sharp that he and his brother, Tom, are named in a criminal investigation into tax evasion by the Canada Revenue Agency wherein a sworn Information to Obtain Search Warrant directly identifies Quarry Bay (identified as "QBC") as a mechanism used to defeat creditors, including the use of fraudulent mortgages similar to the one used in this case. (Appx. 18, MAS 164-165, ¶2 (Ex. A), MAS 177, 180). The legitimacy of the "loan" is a complicated factual matter, the merits of which were not reached by the District Court.

Quarry Bay also states it "independently investigated" and "found no evidence that [Miguel] de la Rosa [Quarry Bay's Nevis agent] received notice of the lawsuit from the registered agent." Ans. Br. at 16. Quarry Bay argues this is the "critical fact"— "Quarry Bay's agent never received process" and again, "de la Rosa … never received the summons and complaint." Id. at 37, 39. The basis for these statements purports to be the Second Declaration of Tom Sharp. (Appx. 14, MAS 94). Importantly, there is no language in this document to support these statements. The Second Declaration states only that **Quarry Bay** claims not to have any record of receiving the documents from de la Rosa or the registered agent. (*Id.*, ¶3). These

are very different things. Receipt by the Nevis agent de la Rosa was proven by the authenticated email from the registered agent transmitting the documents, (Appx 13, MAS 77), and the FedEx receipt properly addressed and signed for. (*Id.*, MAS 79-80). Quarry Bay admits "that process was delivered to a building in which Mr. de la Rosa works." Ans. Br. at 38. The address itself is "the Henville Building" and explains why it is unimportant that the place of delivery is noted as "Main Street" instead of "Prince Charles Street." The building is no doubt on both as the streets intersect. No affidavit was proffered from de la Rosa saying he did not receive the documents. The assumption is that when the FedEx package reached the building, it reached him.

Quarry Bay also appears to be making an argument not raised at the District Court level—that the court entered the default judgment prematurely and that Quarry Bay was thereby deprived of due process. Ans. Br. at 14. Quarry Bay claims it received notice on September 28, 2017, and it could have filed a response by September 29, which would have intervened in the entry of the default judgment, had the Court waited 14 days to enter the order. Importantly, Quarry Bay did not file such a response. Had it timely done so, it may have preserved this argument for appeal. It did not; it waited until October 18, 2017 to file its motion—in contradiction to its assertion it, "sprang into action."

Finally, Quarry Bay states it "choses" not to "fight" two lawsuits. Ans. Br. at 16. No party was fighting the foreclosure. Steen was attempting to resolve the fraudulent conveyance suit in time to sell the property prior to losing it to foreclosure. His efforts were thwarted by the inconsistent positions taken by Heard as to the ownership of Wolf Creek, (Appx. 18, ¶9, MAS 133), and by the efforts of Quarry Bay defending against the indefensible fraudulent conveyance case, causing delay and damages.

III. VACATING THE DEFAULT JUDGMENT AGAINST QUARRY BAY WAS AN ABUSE OF DISCRETION.

A. QUARRY BAY DOES NOT ADDRESS AGENCY.

Quarry Bay asks this Court to accept as fact that because one Tom Sharp was not served directly, that Quarry Bay was not on "actual" notice of the lawsuit. Because Quarry Bay is separately incorporated, the assertion by Mr. Sharp that Quarry Bay, an entity, did not "learn of the lawsuit" until September of 2017 is simply false.

Quarry Bay's arguments rest on an unstated and incorrect assumption—that a plaintiff has the burden to prove a defendant's management has "actual notice" of a lawsuit. Steen does not have to prove that Quarry Bay's agent opened the email sent to it or opened the FedEx package. Rather, the party seeking to set aside a default judgment has the burden of proof. *Montana Professional Sports, LLC v. National Indoor Football League, LLC*, 2008 MT 98, ¶21, 342 Mont. 292, 180 P.3d 1142. It

is up to Quarry Bay to prove that it did not receive notice and to prove a justifiable excuse as to why it then did not act. None is offered.

Remarkably, Quarry Bay does not address the statutory and case law cited by Steen attributing the knowledge of an agent to its principal. *See* Open. Br. at 17. Rather, Quarry Bay claims Rule 60(b)(1), M.R.Civ.P., would be meaningless if all properly served parties were precluded from having their default judgments set aside. Not so. Quarry Bay limits its defense to a bare claim of lack of notice. Rule 60(b)(1) is available for true instances of excusable neglect, such as death in the family, natural disaster, transportation issues or accidents—events outside the control of the individual—the types of troubles and impediments that are suffered by otherwise conscientious persons. However, having organized one's business in a sloppy or careless (or intentionally complicated) manner is not the type of neglect that is justifiable under Montana law.

Operating out of Vancouver, Canada, but with its only business address in Delaware (Appx. 15, MAS 96), Quarry Bay was intentionally organized as a foreign entity in a manner to protect those in control from public disclosure by appointing multiple layers of agents and nominees in jurisdictions as remote as St. Kitts Nevis and Delaware (Appx 13 and 14).

B. QUARRY BAY HAD ACTUAL NOTICE.

Quarry Bay does not question the veracity of the process server or the registered agent, Agents & Corporations, Inc., who received and forwarded the Summons and Amended Complaint. The documents are authenticated by the registered agent in a sworn affidavit (Appx. 13) and include an outbound email dated May 15, 2017 (the date of service) (which is noted as "status: sent" in the upper right hand corner) to Quarry Bay/Miguel de la Rosa (*id.*, MAS 77) which notifies Quarry Bay that it has been served, indicates that the original documents will be forwarded, and provides a link to download the documents; and a signed FedEx receipt showing Miguel de la Rosa as the recipient of the package. (*Id.*, MAS 79-80).[3]

Quarry Bay admits de la Rosa is its agent for purpose of "notice." (Appx. 14, ¶4). Quarry Bay claims it "independently investigated" and found "no evidence that de la Rosa received notice of the lawsuit from Quarry Bay's registered agent." Ans. Brief at 16. This mischaracterizes the Second Declaration of Tom Sharp on which it relies. (Appx 14, MAS 94). That document does not reference whether or not de la Rosa got the email or the FedEx package. Rather, the Declaration simply says "Quarry Bay" has no record of receiving process from de la Rosa. (*Id.*, ¶3).

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[3] Quarry Bay argues there is no evidence presented de la Rosa received the FedEx package, nor that "anyone with any authority in Quarry Bay" received notice of the lawsuit. Ans. Br. at 39. This argument completely ignores the simple fact that service was by hand-delivery to the registered agent at the company's only registered business address, as required by Delaware law. (Appx. 7, MAS 39; Appx. 12, MAS 68; Appx. 13, MAS 72).

The May 15, 2017, email to de la Rosa with a link to the documents (Appx. 13, MAS 77) stands un-contradicted, as is de la Rosa's agency to Quarry Bay. The email states:

> Dear Miguel de la Rosa:
>
> We are the Registered Agent for QUARRY BAY CAPITAL LLC (DE-4374863)
> and we have received Service of Process on behalf of QUARRY BAY CAPITAL LLC.
>
> We will forward the original hardcopy to the address above. You should also download and review the digital copy by clicking the link below. The digital copy may not include all exibits included in the hardcopy.
> Please read the official legal notice in the link below, which may contain a lawsuit (sumons and complaint) or court notice with a limited time to respond.
>
> Click here to view your SOP

(*Id.*). Quarry Bay, through its agent, was on actual notice of the lawsuit. Similarly, Quarry Bay's admission that the FedEx package arrived at the Henville building to which it was addressed, is conclusive that it too, arrived. Ans. Br. at 38 ("...process was delivered to a building in which Mr. de la Rosa works[.]"). There is no affidavit to the contrary.

Quarry Bay criticizes Steen of failing to distinguish *Blume v. Metropolitan Life Insurance Company*, 242 Mont. 465, 791 P.2d 784 (1990), but the default in *Blume* was overturned precisely due to recognition of the thorough procedures in place by the defaulting organization in that case. *Id.*, 242 Mont. at 469, 791 P.2d at 787. Again, *Blume* was service by mail. This case involves hand-delivery to not only the registered agent, but at the corporate offices (the ONLY corporate offices of

record anywhere) of this Delaware (not Canadian) company. *Blume* is distinguishable.

Rather than differentiate the plentiful case law discussed in Steen's Opening Brief, Quarry Bay cites to "courts around the nation." Montana has its own cases on what constitutes actual notice, and those are addressed in Steen's briefing. Many of the cases referenced by Quarry Bay also pre-date email, which is, of course, a form of actual notice in this case.

C. QUARRY BAY DID NOT PROVE A MERITORIOUS DEFENSE.

Quarry Bay claims it, "proved that it had meritorious defenses by showing that Terry Heard had no ownership or control over Quarry Bay... and by showing that the mortgage that allegedly constituted a fraudulent conveyance was based on an antecedent debt Mr. Heard owed Quarry Bay." Ans. Br. at 28.

1. The Mortgage Was Not Based on an Antecedent Debt of Mr. Heard.

In its Statement of Facts, Quarry Bay admits that its "loan" was solely to Mayan Minerals[4], not Heard, (Ans. Br. at 13), and yet it took security in the Montana ranch (owned by an LLC owned 100% by Heard) to secure that "loan" days after the entry of the Utah Judgment against Heard. (Appx. 6, Ex. A, MAS 33; Appx. 17, MAS 106, Ex. A, MAS 109-116). Thus, Quarry Bay's conclusion the conveyance

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[4] In discovery, Quarry Bay also indicates Heard was not liable on the indebtedness. (Appx. 18, Ex. 3, MAS 139 (Request for Production #5) (stating Heard had not signed any guarantee of this obligation)).

to Quarry Bay by Heard was for an "antecedent debt Mr. Heard owed Quarry Bay" (Ans. Br. at 28) is false, as is the claim of meritorious defense. Quarry Bay admits it knew of the Utah Judgment when it took the "security." (Appx 18, Ex. 3, MAS 137 (Request for Admission #3)). By admitting these "facts" in this case, it admits liability under Montana's Uniform Fraudulent Transfer Act ("MUFTA") that the transfer was without adequate consideration and made for the purpose of delaying Steen as a creditor. This contradicts Quarry Bay's self-serving statement it reconveyed the property for convenience and not on the merits.

2. Meritorious Defense to the Alter-Ego Claim.

In reviewing whether the District Court manifestly abused its discretion in vacating the default, this Court must only look to the evidence before the District Court proffered by Quarry Bay at the time, not to "evidence" later proffered on the summary judgment motion. At such time, Quarry Bay proffered only the Declaration of Tom Sharp (Appx. 10) and the exhibits thereto, one of which was a proposed lodged Answer.

Quarry Bay's Answer contained only general denials or statements that it was without information sufficient to respond. (Appx. 10, MAS 47-53). Therefore, the fact it is "Verified" is meaningless since there was no information contained in the Answer to verify. On its face it presents no facts which would constitute a prima facie defense to the claim of alter ego.

Quarry Bay claims the fact that Heard is not on a list of members of Quarry Bay is evidence that Quarry Bay does not function as Heard's alter ego for purposes of handling Heard's off-shore accounts. Ans. Br. at 35-36. Steen's claim is that Heard is the beneficiary/alter-ego of Quarry Bay which functions as an asset protection device. One would not expect such an entity to have Heard as its owner or officer of record. The precise service such companies offer is the sheltering of assets through layered agents and nominees which cannot be directly associated with the actual owner.

Lastly, Quarry Bay relies on the Declaration of Tom Sharp. Only a single sentence in the Declaration, however, purports to address the alter-ego issue:

> 7. Quarry is an independent company that has a large loan portfolio to multiple borrowers. It is not and never has been owned or operated by Mr. Heard.

(Appx. 10, Ex. F, MAS 58). The Amended Complaint alleges alter-ego status based on Quarry Bay's actions in aiding and abetting the fraudulent conveyance and in controlling Heard's overseas funds and funneling them back to Heard at his direction. (Appx. 6, ¶¶48-53, MAS 29). Quarry Bay need not be "owned" or "operated" by Heard to engage in these activities. So the statement to this effect does not constitute a defense. Is the statement that "Quarry is an independent company that has a large loan portfolio to multiple borrowers" sufficient to state a meritorious defense? It certainly begs the question of whether Quarry Bay engaged in the alleged

activities of shielding Heard's assets. This statement alone is not sufficient to provide a meritorious defense to the claim of alter-ego.

In an attempt to refute the merits of the alter ego claim, Quarry Bay states Heard agreed he did not direct Quarry Bay. Ans. Br. at 13. This "evidence" was first presented to the District Court in the context of Steen's Motion to Reinstate Default Judgment. As to the merits of the declaration, Heard was found not to be credible by the Utah court and his actions were found to be "willful, intentional, deceitful, legally malicious and meant to deprive Steen of the value to which he was entitled." (Appx. 11, ¶6, MAS 61; ¶8, MAS 62-63). Heard also engaged in numerous conveyances to defeat Steen, including the fraudulent conveyances to Wolf Creek and Quarry Bay. (Appx. 18, MAS 148 (23:2-26:13)). Heard's testimony is simply not credible.

IV. THE ORDER SETTING ASIDE DEFAULT JUDGMENT WAS INTERLOCUTORY IN NATURE AND COULD BE REVISITED AT ANY TIME.

Quarry Bay claims Steen has no authority for filing a Motion to Reinstate Default Judgment. Ans. Br. at 37-39. However, Quarry Bay also admits the Order Setting Aside the Default Judgment was not final. Id., at 23. Rule 54(b)(1), M.R.Civ.P., provides:

> ... any order or other decision, however designated, that adjudicates fewer than all the claims ... does not end the action as to any of the claims or parties and *may be revised at any time before*

the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(Emphasis added). Such an order is interlocutory in character, and such orders are therefore subject to later review by the trial court, if circumstances warrant. *See Schwabe v Custer's Inn Associates, LLP*, 2000 MT 325, ¶54, 303 Mont. 15, 15 P.3d 903 (trial court did not abuse discretion in revisiting order denying partial summary judgment), *overruled on other grounds*, *Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162 P.3d 134.

Such review may occur *sua sponte* or on the motion of a party. These are not Rule 59 or Rule 60 motions; both of these rules require a final judgment. If a judgment is not final, it is interlocutory. Rule 7(b)(1), M.R.Civ.P., provides for "a request for a court order" to be made by "motion." The requirements of a motion are only that it be (1) in writing unless made during hearing or trial; (2) state with particularity the grounds for seeking the order; and (3) state the relief sought. *Id.* The Motion to Reinstate the Default Judgment was properly before the District Court, and given the indisputable evidence proffered therein as to the receipt of the Summons and Complaint by not only one, but two agents of Quarry Bay, the default should have been reinstated.

Quarry Bay states that prejudice to Steen is not one of the issues. Prejudice to the plaintiff is an element to be considered in reviewing the Order Setting Aside Default, which is also at issue in this case.

V. <u>THE FRAUDULENT CONVEYANCE CLAIM IS NOT MOOT</u>.

Importantly, Quarry Bay does not dispute that Steen may have been entitled to additional relief under MUFTA but claims such request was not made against Quarry Bay. Ans. Br. at 40. Quarry Bay then goes on to argue its reconveyance rendered the transfer no longer voidable and thus it is not subject to attorneys' fees or other damages such as diminution of the property's equity. Id. at 40-42. In *In re Kovler*, 253 B.R. 592 (Bankr. S.D. N.Y. 2000) the court, interpreting New York's fraudulent conveyance law, found the case was not moot where there had been a reconveyance, citing the inequities which would otherwise prevail if a defrauding transferee, "faced with a near certainty of an adverse judgment at trial after forcing a creditor to incur substantial litigation costs, could avoid liability for attorneys' fees simply by belatedly capitulating on the reconveyance issue." *Id.*, 253 B.R. at 598. Similarly here, Quarry Bay should not be allowed to avoid facing all the consequences of its bad acts by a self-serving reconveyance.

Furthermore, Quarry Bay claims Steen did not preserve the issue of additional damages in its Response to Motion for Summary Judgment because it did not address the case of *Kunst v. Pass*, 1998 MT 71, 288 Mont. 264, 957 P.2d 1, to the District Court and only raised in on the first time in this appeal. Ans. Br. at 42. Such position is disingenuous. *Kunst* stands for the proposition that when a party cites a statute in the pleading, all the remedies available under that statute are implicated.

While Steen may not have directly cited *Kunst* to the District Court, it did argue to the court mere reconveyance did not moot the case due to the relief provided under the MUFTA. (Steen's Resp. Br., Court Doc. No. 66 (Appx. 5, MAS 23) at 8-9). Steen brought to the attention of the court in his response the statutes upon which he relied upon for relief, which were clearly cited in the Amended Complaint.

Next, Quarry Bay argues that Steen's request for such "other and further relief" was requested from "Heard but not from Quarry Bay." Ans. Br. at 42. First, Heard is not a party to this suit and never was–the suit was brought against Wolf Investments Ltd. Second, the argument that Steen was limiting his request to a single defendant is absurd. In hindsight the relief requested in the Amended Complaint could have been more artfully worded. However, that does not lessen the fact that Quarry Bay was on notice that under the Second Claim for Relief – Fraudulent Conveyance Against Quarry Bay – the relief Steen would be seeking was that found in § 31-2-339, MCA. (Appx. 6, ¶27, MAS 27 (adopting by reference ¶26 which outlined the remedies sought)).

VI. MONTANA IS THE PROPER FORUM.

This case is like dominoes. Only if this Court rejects Steen's request to reinstate the default judgment, do the other issues manifest. If the case is remanded on further damages on the fraudulent conveyance case, then it is appropriate for all claims between the parties to be litigated in Montana since the alter ego issues arise

in part out of the fraudulent transfers. Only if Steen loses on both those issues does the issue of *forum non conveniens* then arise. When fully cognizant of the Utah Judgment against Heard (Appx 18, Ex. 3, MAS 137 (Request for Admission #3)), Quarry Bay agreed to take Montana Property as security for what it calls a "loan" to third party Mayan, and thus submitted itself to Montana jurisdiction regarding the validity of both the transfer and the loan. The legitimacy of the "loan" is at the heart of the alter ego case. The courts of Montana should not lend their support by requiring this litigant, who came here in good faith and with good cause, to go elsewhere for his remedies against a company that itself engaged in wrongful conduct in Montana.

VII. CONCLUSION.

The appeal in this case is timely because there is no exception to the rule requiring finality for an order vacating a default judgment and in this case the default judgment itself constituted an interlocutory judgment due to the ongoing claims against the third party, Wolf Creek. The interlocutory nature of the Order Setting Aside Default Judgment means that order could be reviewed at any time by the District Court on a motion by a party. Rules 59 and 60 are not implicated.

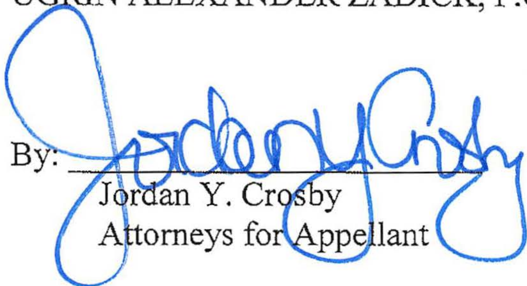
As to the merits of the Order Setting Aside the Default Judgment, Quarry Bay continues to stand its ground that Quarry Bay, an entity, did not receive notice of a lawsuit with which it was properly served through a registered agent. This is simply

a legal non-sequitur. Thus, Quarry Bay has shifted its argument to complaining Quarry Bay's *management* did not receive *actual* notice. Quarry Bay's failure to create internal procedures whereby specific persons would be notified does not constitute excusable neglect or good cause. There is no basis for imposing upon a litigant the requirement to serve undisclosed persons who claim "managerial" responsibility. Only by imposing a new and unarticulated duty on plaintiffs can this appellate court affirm the lower court. Accordingly, the default judgment should stand.

Alternatively, the case should be remanded for trial on the fraudulent conveyance and alter-ego issues. Steen's Amended Complaint challenged the obligation as well as the mortgage. The MUFTA provides numerous remedies against a subsequent transferee of a fraudulent conveyance, which were properly pled in the Amended Complaint, including a request for attorneys' fees. The court erred in finding the matter was rendered moot by Quarry Bay's voluntary reconveyance of the Property when Steen was not made whole by the sale of Property. Finally, Montana is the proper forum for litigating Steen's alter ego claim. When participation in a scheme to engage in fraudulent conveyances in Montana forms the basis for an alter ego claim, there is sufficient nexus with Montana to try the case here.

DATED this 7th day of June, 2019.

UGRIN ALEXANDER ZADICK, P.C.



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is not more than 4997 words, excluding the table of contents, table of authorities, table of appendices, certificate of service and certificate of compliance.

Dated this 7th day of June, 2019.

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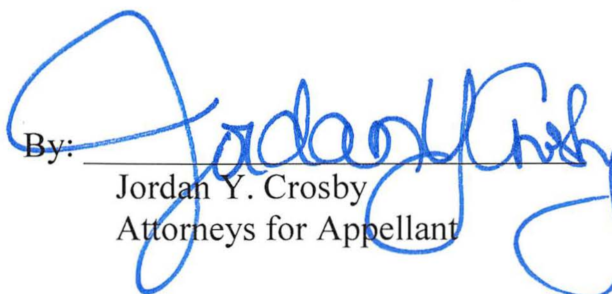

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