

NO. 2020-73679

MANUEL A. ACOSTA and
 ROSARIO S. ACOSTA

IN THE DISTRICT COURT

vs.

PECHUA, a Nevada corporation;
 THE ACOSTA FAMILY TRUST with
 VINH TRUONG, TRUSTEE;
 COUNTRYWIDE ASSET MANAGEMENT,
 LLC, a Nevada Corporation;
 PREFORECLOSURE SPECIALIST, LLC,
 a foreign limited liability company;
 THE WESTCREST SPECIALIST TRUST,
 QUANG V. TRUONG, TRUSTEE; and
 REALSTONE ADVISORS & ASSOCIATES,
 LLC, a Texas limited liability company

§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§

270th JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

PLAINTIFFS' MOTION TO REINSTATE

Plaintiffs ask the court to reinstate this case on its docket, under the authority of Texas Rule of Civil Procedure 165a.

A. Introduction

1. Plaintiffs are MANUEL A. ACOSTA and ROSARIO S. ACOSTA; Defendants are PECHUA, a Nevada corporation; THE ACOSTA FAMILY TRUST with VINH TRUONG, TRUSTEE; REALSTONE ADVISORS & ASSOCIATES, LLC, a Texas limited liability company; COUNTRYWIDE ASSET MANAGEMENT, LLC, a Nevada Corporation; PREFORECLOSURE SPECIALIST, LLC, a foreign limited liability company; THE WESTCREST SPECIALIST TRUST, QUANG V. TRUONG, TRUSTEE; VINH QUANG TRUONG a/k/a QUANG V. TRUONG, individually; and JESSICA DAVALOS, individually.

2. Plaintiffs filed this lawsuit against Defendants on November 16, 2020, and promptly had citation issued and served Defendants. Defendants have all filed an Answer.

3. On September 19, 2023, the Court sent a DCA Generic Letter advising all parties of the

Docket Call scheduled for Monday, November 13, 2023 from 8:00 a.m. to 9:00 a.m.

B. Facts

4. On November 13, 2023, Plaintiffs attended this Court's Docket Call via zoom. The Docket Call instructed Plaintiffs to send the Court an e-mail that included in the subject line the Case number, how long Plaintiffs needed to try the case, and whether the e-mail was being sent by Plaintiffs or Defendants. Plaintiffs complied with the Court's Docket Call. See "Exhibit A" attached.

5. Immediately after sending the e-mail per the Court's Docket Call instruction, Plaintiffs received an automatic reply from the Court asking Plaintiff to file all pre-trial documents. Plaintiffs had previously filed these documents with the Court so they did not re-file them again. See "Exhibit B" attached.

6. On November 16, 2023, the court dismissed the case for want of prosecution because of Plaintiffs' failure to appear and/or comply with the Docket Call on November 13, 2023. However, Plaintiffs did appear and comply with the Court's Docket Call.

7. Plaintiffs file this motion while the court has plenary power, within thirty (30) days of dismissal. The court therefore has jurisdiction to reinstate this case. Tex. R. Civ. P. 165a(3).

C. Failure to Appear

8. A court should grant a motion to reinstate if the plaintiff's failure to file the motion for default judgment was not intentional or the result of conscious indifference but was the result of a mistake or an accident or can otherwise be reasonably explained. Tex. R. Civ. P. 165a(3); *Smith v.*

Babcock & Wilcox Constr. Co., 913 S.W.2d 467, 468 (Tex. 1995); *Melton v. Ryander*, 727 S.W.2d 299, 301-02 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). A party's failure to appear is not intentional or due to conscious indifference within the meaning of Rule 165a merely because it is deliberate. *Smith*, 913 S.W.2d at 468. To support a dismissal, the failure to appear must be without adequate justification. *Id.* Proof of such justification—accident, mistake, or other reasonable explanation—negates the intent or conscious indifference for which reinstatement can be denied. *Id.*; *Bank One v. Moody*, 830 S.W.2d 81, 84 (Tex. 1992). {See *O'Connor's Texas Rules*, “Notice of dispositive setting,” ch. 10-F, §3.4.1(3), p. 722. }

9. Plaintiffs did not fail to appear. Specifically, Plaintiffs' counsel appeared at the Docket Call and complied with the requirements listed in the Court's Docket Call. Plaintiffs' counsel also received confirmation from the Court that he complied with Docket Call via the automatic reply email from the Court.

10. Plaintiffs' counsel contacted the court coordinator after learning of the dismissal for want of prosecution and was told they had searched their e-mails but for some reason did not see Plaintiffs' e-mail to the Court that complied with the Court's Docket Control order. The trial coordinator asked Plaintiffs to file this Motion to Reinstate the case based on this misunderstanding or mistake.

D. Conclusion

11. A court should grant a motion to reinstate if there is good cause to maintain the case on the docket. Tex. R. Civ. P. 165a(1). This case should be decided on the merits, not on a procedural default. The court should reinstate this case for the reasons set forth herein.

E. Prayer

12. For these reasons, Plaintiffs ask the court to set this motion for hearing and, after the hearing, grant the motion and reinstate this case on the docket.

Respectfully submitted,

TED A. COX, P.C.

/s/Andrew Wheeler

ANDREW WHEELER, SBOT #24099577

TED A. COX, SBOT #04956480

Attorney for Plaintiffs

2855 Mangum Rd, Ste 100A

Houston, Texas 77092-7463

Telephone: 713-956-9400

Facsimile: 713-956-8485

E-Service: service@tedacox.com

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with counsel for Defendants and Defendants' counsel is unopposed to Plaintiffs' Motion to Reinstate.

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of December, 2023, served a true and correct copy of the foregoing upon:

Jeffrey C. Jackson
JEFFREY JACKSON & ASSOCIATES, PLLC
2500 E. TC Jester, Suite 285
Houston, Texas 77008
Telephone: 713-861-8833
E-mail: jeff@jjacksonllp.com

Via E-Service, E-Mail and/or Facsimile

/s/Andrew Wheeler

ANDREW WHEELER