

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

|                  |   |                       |
|------------------|---|-----------------------|
| David R. Demusz, | : |                       |
|                  | : | C.A. No. 06-11-0172AP |
| Defendant below/ | : |                       |
| Appellant,       | : |                       |
|                  | : |                       |
| v.               | : |                       |
|                  | : |                       |
| Linda L. Smith,  | : |                       |
|                  | : |                       |
| Plaintiff below/ | : |                       |
| Appellee.        | : |                       |

Submitted: February 13, 2007

Decided: February 13, 2007

**Decision on appeal from the Justice of the Peace Court.**

**Appellant's appeal is dismissed and**

**Judgment of the Justice of the Peace Court is affirmed.**

**David R. DeMusz, 100 Tupelo Court, Felton, Delaware 19943, Pro Se Appellant.**

**Linda L. Smith 1266 Moose Lodge Road, Wyoming, Delaware 19934, Pro se Appellee.**

**Trader, J.**

In this civil appeal from the Justice of the Peace Court I hold that the magistrate correctly exercised his discretion in denying the defendant's motion to vacate the default judgment. Accordingly, the appeal is dismissed and the judgment of the Justice of the Peace Court is affirmed.

The relevant facts are as follows: On June 6, 2006, the plaintiff, Linda L. Smith, filed a civil action against the defendant, David R. Demusz, in Justice of the Peace Court 16. On June 29, 2006, service of process was made upon the defendant by unclaimed certified mail and on September 1, 2006, a judgment by default was entered against him for the sum of \$500.00.

On September 5, 2006, the defendant filed a motion to vacate the default judgment. On September 22, 2006, the defendant failed to appear on behalf of his motion to vacate the default judgment and the motion was denied. On September 29, 2006, the plaintiff requested an execution for the levy on the goods and chattels of the defendant and on October 31, 2006, the constable executed a levy on the personal property of the defendant.

On October 24, 2006, the defendant filed a further application to vacate the default judgment and this motion was denied by the magistrate on November 17, 2006. On November 24, 2006, the defendant filed a notice of appeal and praecipe with this Court and a certified copy of the judgment in the court below was filed on December 13, 2006. On December 13, 2006, I granted the defendant's petition to proceed in *forma pauperis* and waived all fees and costs in connection with the appeal. Additionally, I permitted the defendant to file his appeal without posting a supersedeas bond or cash deposit, and stayed the execution in the court below until this appeal is decided.

This is an appeal from the Justice of the Peace Court's denial of a request to vacate a default judgment. The denial of a motion to vacate a default judgment possesses all the attributes of finality. *Ney v. Polite*, 399 A.2d 527 (Del. 1979). The appeal, however, is limited to the review of the magistrate's order denying relief and not the default judgment itself. *Id.* at 529. A review of a magistrate's denial on a motion to vacate a default judgment should include an evidentiary hearing on all factors pertinent to the motion for relief of judgment. *Kenyon v. Setting*, 1992 WL 52200, at \*2 (Del. Super. Feb. 20, 1992).

The threshold requirement in deciding whether to vacate a default judgment under Civil Rule 60(b)(1) is to establish that a moving party's conduct or neglect is that of reasonably prudent person under the circumstances. *McMartin v. Quinn*, 2004 WL 249576, at \*2 (Del. Super. Feb. 3, 2004). The Court must examine each case to determine if the movant acted as a reasonably prudent person. *Keith v. Melvin L. Joseph Construction Co.*, 451 A.2d 842, 846 (Del. Super. 1982). The moving party also must establish the possibility of a meritorious defense and no substantial prejudice to the non-moving party. *Id.*

In the case before me, the defendant failed to appear for trial on September 1, 2006 and a default judgment was entered against him. He subsequently filed a motion to vacate a default judgment and failed to appear on September 22, 2006 to prosecute his motion. The defendant filed another motion to vacate the default judgment and this motion was denied by the magistrate on November 17, 2006. At the evidentiary hearing, the defendant claimed that he did not receive notice of the trial date, but I do not find that his testimony is credible. He testified that he was aware of the date of his scheduled

motion to vacate the defendant's judgment, and he failed to attend that hearing. His excuse was that he forgot about the hearing because of a traffic violation scheduled in the same court. I conclude that the defendant did not give a persuasive reason for either his failure to appear for trial or for his failure to appear at the hearing on his initial motion to vacate the default judgment. I cannot conclude the defendant's conduct was that of a reasonably prudent person under the circumstances. Additionally, the defendant has not established a meritorious defense. I believe the plaintiff's testimony that she paid him \$300.00 for cleaning the boarding and grooming kennels, and I disbelieve the defendant's testimony and the testimony of his wife on this issue. Therefore, the magistrate correctly denied the defendant's motion to vacate the default judgment.

Accordingly, this appeal is dismissed, the stay of execution is vacated, and the judgment of the court below is affirmed.

**IT IS SO ORDERED.**

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**Merrill C. Trader**  
**Judge**