IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

COUNTY BANK,	:	
	:	C.A. No. K12J-01350 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
LARRY THOMPSON, SR. and ROSA L. THOMPSON,	:	
	:	
Defendants.	:	

Hearing Held: October 28, 2013
Decided: December 5, 2013

ORDER

Upon Defendants' Motion to Vacate Entry of Confessed Judgment. *Denied.*

Stephen W. Spence, Esquire of Phillips Goldman & Spence, P.A., Wilmington, Delaware; attorney for Plaintiff.

Susan E. Flood, Esquire of Legal Services Corporation of Delaware, Inc., Wilmington, Delaware; attorney for Defendants.

WITHAM, R.J.

INTRODUCTION

Before the Court is Defendants' Motion to Vacate Entry of Confessed Judgment filed pursuant to Superior Court Civil Rule 60(b)(6). Defendants argue that they did not knowingly, voluntarily and intelligently waive their rights to notice and a hearing. Plaintiff responds that: (1) Defendants have failed to establish grounds for relief under Rule 60(b) and (2) Defendants have failed to establish that they did not effectively waive their due process rights. For the reasons set forth below, Defendants Motion is **DENIED** and a writ of execution shall issue upon Plaintiff's judgment.

FACTS AND PROCEDURE

The Defendants in this matter, Larry Thompson, Sr. (hereinafter "Larry") and his wife, Rosa Thompson (hereinafter "Rosa") (collectively "the Thompsons") executed a promissory note in 2006 with Plaintiff County Bank (hereinafter "Plaintiff"). The Thompsons secured the loan via a construction mortgage on their property in Felton. The Thompsons had previously executed a promissory note and construction mortgage in regards to the Felton property in 2005; the 2006 loan transaction was a refinancing of the original loan.[1] In October of 2011, the parties entered into a Change of Terms Agreement, in which the loan's interest rate was reduced and the maturity date was extended.

The 2005 promissory note, 2005 construction mortgage, 2006 promissory note,

[1] It is the 2006 promissory note upon which judgment by confession was entered and which Plaintiff is currently seeking to enforce.

2006 construction mortgage, and 2011 Change of Terms Agreement all contained confession of judgment provisions. The provision is nearly identical in each instrument, and appears in all capital letters and bold-faced type. In both 2005 and 2006, settlement on the Felton property was held at the offices of CAP Title in Rehoboth Beach. Attorneys acting as settlement agents were present at both settlements. The Thompsons did not retain their own attorney for either settlement, but their real estate agent[2] was present at both closings.

The Thompsons defaulted on the loan in 2012 by missing several payments. By letter dated September 5, 2012 counsel for Plaintiff informed the Thompsons of their defaults and demanded full payment on the outstanding balance of the loan with ten days of the letter's receipt. The letter was sent via certified mail and was signed for by Rosa on behalf of herself as well as on Larry's behalf. The Thompsons did not respond to the letter. On September 28, 2012 Plaintiff filed its complaint to obtain an entry of confessed judgment against the Thompsons in the amount of $229,434.09 plus interest, late charges and attorney's fees. A copy of the complaint was mailed to the Thompsons via certified mail. Rosa again signed for herself and her husband. The complaint notified the Thompsons that they had the opportunity to appear before the Court on November 9, 2012 to object to the entry of judgment. The complaint

[2] A major thrust of the Thompsons' argument appears to be that the real estate agent defrauded the Thompsons by persuading them via misrepresentations to enter into loan agreements that were extremely disadvantageous to them. The real estate agent is not a party to this action nor any other action pending before this Court. The Court declines to name the real estate agent because (1) the Thompsons' allegations against him are unsubstantiated at this time and (2) the Court finds the Thompsons' argument regarding the real estate agent unpersuasive.

also notified the Thompsons that, at the hearing, Plaintiff would have the burden of proving the Thompsons effectively waived their rights to notice and a hearing prior to the entry of judgment.

The Thompsons did not answer the complaint and did not appear at the hearing on November 9. The Court orally entered judgment for Plaintiff in the amount $239,641.43, and Plaintiff subsequently filed for a writ of execution to issue upon the judgment. On November 19, 2012 the Thompsons filed for Chapter 13 bankruptcy.[3] The bankruptcy action was ultimately dismissed on May 20, 2013. On August 9, 2013, following the dismissal of the bankruptcy action, this Court held a hearing on Plaintiff's tentative motion for execution upon the confessed judgment. The Thompsons attended this hearing, and were now represented by Legal Services Corporation of Delaware. This Court requested memoranda of law from both parties as to how the law pertained to this matter.

On September 20, 2013 the Thompsons filed the instant Motion to Vacate Entry of Confessed Judgment pursuant to Superior Court Civil Rule 60(b)(6). The Thompsons also filed a memorandum of law, which focused almost entirely on the issue of whether the Thompsons made an effective waiver of their right to pretrial notice and a hearing prior to the entry of confessed judgment. Plaintiff responded with its own memorandum of law in which Plaintiff contended that the Thompsons failed to establish why they were entitled to relief under Rule 60(b). Plaintiff also

[3] Interestingly, the Felton property loan was listed as an uncontested debt in the Thompsons' bankruptcy petition.

contended that the Thompsons effectively waived their due process rights, and renewed its request for a writ of execution.

The Court held a hearing on the Thompsons' Motion on October 28, 2013. Both Rosa and Larry testified at the hearing and were subjected to cross-examination. A primary focus of counsel's arguments and the Thompsons' testimony was the issue of effective waiver. The Thompsons alleged that no one explained the confession of judgment provisions to them at either the 2005 or 2006 settlements at CAP Title. The Thompsons further testified that the settlement agents present at the settlements were not their attorneys.

As to the Thompsons' business sophistication, testimony revealed that Larry has a high school education and loads truck shipments for a living. Rosa, at all times relevant to these proceedings, allegedly could not read, and only recently Rosa has attained the equivalent reading level of a first grader or second grader. Rosa is currently unemployed. Neither Larry nor Rosa have any sophisticated business experience nor any legal experience. Larry testified that, notwithstanding Rosa's inability to read, Rosa "took care of the bills" because Larry worked too much to deal with them.

The other primary focus of the October 28 hearing was whether this Court should even reach the issue of waiver. Plaintiff argued that the Thompsons failed to establish grounds for relief under Rule 60(b), which is independent from the issue of waiver. Plaintiff further argued that the Thompsons had the opportunity to address the issue of waiver at the November 9, 2012 hearing, which the Thompsons had

notice of and chose not to attend, and thus the Thompsons should be precluded from arguing the issue now. The Thompsons argued that the Court has discretion to reopen the judgment against them under the catch-all provision of Rule 60(b)(6), and that the circumstances underlying the loan transactions and execution of documents in this case justifies relief. As to why the Thompsons did not attend the November 9 hearing, both Rosa and Larry testified that upon receiving the confession of judgment complaint and notice of the hearing, the Thompsons consulted their bankruptcy attorney about whether the Thompsons should attend the hearing. Both of the Thompsons testified that the bankruptcy attorney told them they did not need to attend the November 9 hearing.[4] The Thompsons did not mention the bankruptcy attorney's advice nor their reliance on it in their memorandum of law. Other than the testimony of Rosa and Larry, no evidence was presented as to the bankruptcy attorney's advice that the Thompsons not attend the November 9 hearing.[5]

DISCUSSION

The Court agrees with Plaintiff that the Thompsons have failed to meet their burden under Rule 60(b). Accordingly, the Court does not reach the merits of the Thompsons' waiver argument.

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[4] The bankruptcy attorney is not a party to this or to any other related proceeding. As with the real estate agent, and for the same reasons, the Court declines to name the bankruptcy attorney.

[5] During closing arguments, counsel for the Thompsons implied that the Thompsons' reliance on the bankruptcy attorney's advice in not attending the November 9 hearing constituted mistake under Rule 60(b)(1), thus providing additional and independent grounds to vacate the judgment in addition to the catch-all basis of Rule 60(b)(6).

When a plaintiff seeks to confess judgment against a defendant, the defendant is entitled to two hearings.[6] First, the defendant has the opportunity to contest the entry of confessed judgment at an initial hearing, at which the plaintiff has the burden of establishing that the defendant made a voluntary, knowing and intelligent waiver of its due process rights.[7] The narrow purpose of this hearing is for the plaintiff to establish an effective waiver on the part of the defendant based on the totality of circumstances.[8] Second, prior to the first issuance of a writ of execution upon the judgment, the defendant has the opportunity to appear before the Court in a second hearing at which the defendant may raise any appropriate defenses which are not deemed to have been waived.[9] At this second hearing, the burden shifts to the defendant to prove these defenses by a preponderance of the evidence.[10]

When defendants have a confessed judgment entered against them, the "generally accepted recourse available" is to file a motion to vacate or open the judgment pursuant to Superior Court Civil Rule 60.[11] Rule 60 provides multiple grounds for relief from a judgment; Rule 60(b)(1) provides relief from a final

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[6] *See Auth Sausage Co. v. Dutch Oven II, Inc.*, 2001 WL 209817, at *1 (Del. Super. Jan. 16, 2001).

[7] 10 *Del. C.* § 2306(b); Del. Super. Ct. Civ. R. 58.1(g)(3).

[8] *See Mazik v. Decision Making, Inc.*, 449 A.2d 202, 204 (Del. 1982).

[9] 10 *Del. C.* § 2306(j); Del. Super. Ct. Civ. R. 58.1(h)(3)(III).

[10] *Auth Sausage Co.*, 2001 WL 209817, at *1.

[11] *PNC v. Sills*, 2006 WL 3587247, at *6 (Del. Super. Nov. 30, 2006).

judgment on the grounds of "[m]istake, inadvertence, surprise, or excusable neglect. . . ."[12] Under Rule 60(b)(1), the Court must balance its policy favoring the disposition of cases on their merits against preserving the finality of judgments and insuring there is an end to litigation.[13] This balance is frequently determined by examining "whether the conduct of a party moving under Rule 60 to set aside a judgment was the conduct of a reasonably prudent person."[14] The moving party must also establish the possibility of a meritorious defense, and the lack of substantial prejudice to the non-moving party.[15] Mistakes of law are not as favored as grounds for relief as mistakes of fact.[16]

Rule 60(b)(6) provides that a final judgment can be set aside for "any other reason justifying relief from operation of the judgment."[17] This provision is an independent ground for relief, involving a different standard than the other

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[12] Del. Super. Ct. Civ. R. 60(b)(1).

[13] *PNC*, 2006 WL 3587247, at *5 (citing *Hallock v. Weiner*, 1988 WL 116421, at *1 (Del. Super. Oct. 5, 1988)).

[14] *Id.*

[15] *Id.*

[16] *Keystone Fuel Oil Co. v. Del-Way Petroleum, Inc.*, 364 A.2d 826, 829-30 (Del. Super. 1976) (citing *Patapoff v. Vollstedt's, Inc.*, 267 F.2d 863, 865-66 (9th Cir. 1959)).

[17] Del. Super. Ct. Civ. R. 60(b)(6).

subdivisions of Rule 60(b).[18] Relief under this provision is an "extraordinary remedy, so the Court applies the extraordinary circumstances test."[19] In considering whether the moving party has shown extraordinary circumstances justifying relief, the Court should keep in mind that Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."[20] Stated differently, the moving party must show "something beyond. . .neglect" in order to satisfy the extraordinary circumstances test.[21]

The Thompsons have moved to vacate the confessed judgment pursuant to Rule 60(b)(6). In their memorandum of law in support of the motion, the Thompsons mainly argue the issue of effective waiver, and provide no independent basis for why this Court should grant them relief from the judgment. The Thompsons had the opportunity to present evidence and testimony on the issue of waiver at the November 9 hearing, of which they received notice. The Thompsons deliberately chose to not attend the hearing and instead opted to file a petition for bankruptcy approximately one week after the hearing date. The Thompsons' memorandum, as well as their testimony at the October 28 hearing, focused on the Thompsons' lack of business

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[18] *Jewell v. Div. of Soc. Servs.*, 401 A.2d 88, 90 (Del. 1979) (citing *Cox v. Gen. Motors Corp.*, 239 A.2d 706, 707 (Del. 1967)).

[19] *Mendiola v. State Farm Mut. Auto. Ins. Co.*, 2006 WL 1173898, at *4 (Del. Super. Apr. 27, 2006) (citing *Cooke v. Cobbs*, 2003 WL 22535080, at *1 (Del. Super. Oct. 22, 2003)) (internal quotations omitted).

[20] *Cooke*, 2003 WL 22535080, at *1 (quoting *Jewell*, 401 A.2d at 90).

[21] *Id.* at *2.

sophistication and the involvement of their real estate agent in somehow duping the Thompsons into executing mortgages with Plaintiff that were disadvantageous to the Thompsons. The lack of sophistication argument goes to the issue of waiver, which is a separate issue from whether extraordinary circumstances exist that justify relief. The Court finds the real estate agent argument to consist of unsubstantiated allegations, and is unpersuasive. Both of these arguments fall far short of satisfying the extraordinary circumstances test.

At the October 28 hearing, both of the Thompsons testified that they did not attend the November 9 hearing based on the advice of their bankruptcy attorney. The Court notes that the Thompsons did not raise this argument in their memorandum of law. While this allegation is certainly troubling, the Court finds this argument also fails to satisfying the high standard of the extraordinary circumstances test. First, even if the Thompsons' bankruptcy attorney advised them that they did not need to attend the November 9 waiver hearing, this would amount to negligence on the part of the attorney. Based on the extraordinary nature of relief under Rule 60(b)(6), something beyond the attorney's negligence would be necessary in order for the Thompsons to make the required showing of extraordinary circumstances.

Second, the Court did not find Rosa and Larry to be especially credible at the October 28 hearing, based on multiple inconsistencies and flaws in their respective testimony. For example, neither Rosa nor Larry could definitively say whether they had officially retained the bankruptcy attorney when they asked him whether they should attend the November hearing. As another example, Rosa testified she had

missed several loan payments, while Larry testified that Rosa made every single payment. Finally, and most importantly in the Court's view, Rosa testified that she had zero reading ability when she executed the various documents relating to the Felton property loan. Yet Larry testified that Rosa was responsible for handling correspondence pertaining to the loan and for making loan payments. The Court finds it difficult to believe, even considering the Thompsons' financial situation and lack of business sophistication, that a husband would place his illiterate wife in charge of the couple's finances, without any oversight or participation whatsoever. Based on these credibility issues, the Court cannot give great weight to the Thompsons' testimony that their bankruptcy attorney was responsible for their failure to attend the November 9 hearing.

To the extent that the Thompsons are also arguing for relief on the grounds of mistake under Rule 60(b)(1), this argument also fails. Besides the credibility issues noted above, the mistake in this case is one of law, not fact, which are not as favored as grounds for relief under this provision. The balancing of policies under Rule 60(b)(1) favors denial of the Thompsons' Motion.

For the same reasons that the Thompsons have failed to establish grounds for relief under Rule 60(b), the Court finds they have failed to meet their burden in establishing any defense to execution upon the judgment against them. In sum, the Thompsons had their bite at the apple to litigate the issue of waiver on November 9, 2012 and chose not to take it. It is unfortunate, but the Thompsons have not established a basis to reopen the judgment and address the issue of waiver now.

The Court is not without sympathy to the Thompsons' situation, and notes that during the October 28 hearing, counsel for Plaintiff discussed the possibility of options for the Thompsons and Plaintiff to pursue that would avoid foreclosure upon the Thompsons' home. The Court is hopeful that the parties can reach a solution that is beneficial to both parties in this otherwise unfortunate situation. The Court also notes that this decision in no way prevents the Thompsons from pursuing legal recourse against the real estate agent or bankruptcy attorney, if the Thompsons so choose.

CONCLUSION

The Court does not reach the issue of waiver because the Thompsons have failed to establish grounds for relief under Rule 60(b). Accordingly, the Thompsons' Motion to Vacate Entry of Confessed Judgment is **DENIED.**

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh