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RE: Baltimore Trust Company v. Ronald Rick McGee
C.A. No. 93L-10-004

Dear Counsel:

In this case, Baltimore Trust Company ("BTC") foreclosed a mortgage against the defendant, Mr. Ronald Rick McGee. The property involved a location where Libby's Restaurant has operated in Fenwick Island, Delaware. After public sale, a confirmation hearing was held. A junior lienholder, the Small Business Administration, purchased the property to protect its interest. The Court declined to confirm the sale to protect against injury and injustice. BTC filed a motion to reargue the decision, and it is denied for the following reasons.

Two points raised by defendant required this result. These matters concerned the terms of a stipulated judgment entered against defendant on December 13, 1993. It read:

STIPULATION OF JUDGMENT

> Now comes the Plaintiff, Baltimore Trust Company, by and through its counsel, the law firm of Sergovic & Ellis, P.A., and now comes the Defendant, Ronald Rick McGee, by and through his counsel, the law firm of Biggs & Battaglia, and stipulate that a judgment in rem shall be entered in favor of the Plaintiff, and against the Defendant, in the amount of $378,000.00 as of September 1, 1993, *together with interest thereon at the current rate of 7 percent per annum from September 1, 1993, or at a per diem of $72.49 until confirmation of a sale* pursuant to the Note and Mortgage, plus reasonable attorney's fees of up to 5 percent, subject to confirmation by the Court on application of Plaintiff, *plus post-judgment interest and late interest at the aforesaid rate*, provided however, that the effective date of the judgment in rem shall be January 17, 1994. (emphasis added.)

First, concerning the judgment, "late interest" was mentioned. Yet, none was due, and over $27,000.00 was improperly sought to be collected as late charges. Second, over $63,000.00 in interest was asserted above the 7 percent judgment rate. This figure represented what could have been collected over time had variable prejudgment and postjudgment interest been expressed. This formula is not authorized under the terms of the stipulated judgment. Since 1993, noticed sales were delayed by bankruptcy proceedings, and interest rates have fluctuated.

Motions for reargument are appropriate where principles or authorities were overlooked that would change a result. Should the law or facts be misunderstood, relief is

readily granted. The facts or applicable law at the time of decision are reviewed.[1] This procedure, however, is not available merely to revisit previously rejected positions.[2]

As the bench ruling found, the stipulated judgment reflected BTC's direction in its letter of November 29, 1993 (Exhibit 5 to Mr. Sergovic's letter of May 4, 2001). Independently, the stipulated judgment fixed a prejudgment and postjudgment interest rate at 7 percent until confirmation of a sale. Until then, the per diem number expressed the same rate. The note and mortgage were signed on December 23, 1986.[3] These loan documents did not establish a variable, periodic or floating rate of interest upon acceleration of the debt after default. Nor was a judgment interest rate defined.

Certainly, banks were permitted to charge a variable or periodic rate of interest under loan provisions in 1981.[4] Yet, whether a differently crafted stipulation of judgment might

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1 *Miles, Inc. v. Cookson America, Inc.*, Del. Ch., 677 A.2d 505, 506 (1995).

2 *Red Mill Farms Property Owners Ass'n v. County Council of Sussex County*, Del. Ch., C.A. No. 941-S, Longobardi, V.C . (Feb. 17, 1984), Mem. Op. at 3,

3 The note was signed by Ronald Rick McGee and Dawn E. McGee. The mortgage was signed only by Ronald Rick McGee.

4 5 *Del. C.* § § 963, 964.

permit this consequence was immaterial to the decision.[5]

[5] Although not citing Title 5 provisions allowing for periodic rates of loan interest, the Third Circuit opined that the Delaware Supreme Court would determine the judgment rate of interest under 6 *Del. C.* § 2301 to be the rate in effect at time of judgment. Here that rate was 7 percent per annum. *McNally v. Nationwide Ins. Co.*, 3rd Cir., 815 F.2d 254, 268-70 (1987). BTC argues *McNally* wrongfully interpreted Delaware law, as a floating rate may be a maximum rate under 6 *Del. C.* § 2301. At this stage, the argument makes no difference to the result.

Here, the Sheriff's sale was not confirmed in the exercise of the Court's oversight responsibilities.[6] BTC confessed error in attempting to collect over $27,000.00 in late charges. Moreover, on the face of the stipulated judgment a 7 percent fixed interest rate is provided, but over $63,000.00 in excess interest was charged. Either irregularity required judicial intervention to ensure the fair, just and reasonable use of the execution process and function.

To salvage its position, BTC sought to modify the stipulated judgment under Superior Court Civil Rule 60(a). The request was made to substitute new language imposing a variable rate above 7 percent for prejudgment and postjudgment interest. This approach ignored major differences between clerical and substantial mistakes under subsections (a) and (b).[7]

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[6] *Burge v. Fidelity Bond and Mortg. Co.*, Del. Supr., 648 A.2d 414, 420 (1994).

[7] Superior Court Civil Rule 60 provides for relief of judgment or orders as follows:

In this regard, Rule 60(a) is only available in limited circumstances. Pertinent authorities make the point this way:

> In sum, the relevant test for the applicability of Rule 60(a) is whether the change affects substantive rights of the parties and is[,] therefore[,] beyond the scope of 60(a) or is[,] instead[,] a clerical error, a copying or computational mistake, which is correctable under the Rule. . . . If . . . cerebration or research into the law or planetary [sic] excursions into facts is required, Rule 60(a) will not be available to salvage . . . blunders.

> (a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of any party and after such notice, if any, as the Court orders.
>
> (b) Mistake . . . On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect; . . .

> Let it be clearly understood that Rule 60(a) is not a perpetual right to apply different legal rules or different factual analyses to a case. *It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal perambulations* which are reachable through Rule 60(a). (Emphasis added.) [8]

Moreover:

> Subdivision (a) deals solely with the correction of errors that properly may be described as clerical or as arising from oversight or omission. Errors of a more substantial nature are to be corrected by a motion under Rule 59(e) or 60(b).
>
> When the change sought is substantive in nature, *such as a change in the calculation of interest not originally intended, . . .* relief is not appropriate under Rule 60(a).
>
> Thus[,] a motion under Rule 60(a) can only be used to make the judgment or record speak the truth *and cannot be used to make it say something other than what originally was pronounced.*(Emphasis added.)[9]

Applying these principles, the Fifth Circuit ruled that a mistake in judgment interest was solely remedied through Rule 60(b). It rejected a Rule 60(a) argument.[10]

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[8] 12 James W. Moore, et al., *Moore's Federal Practice*, ¶ 60.11[3] at 60-38 (3d ed. 1997).

[9] 11 Charles A. Wright, et al., *Federal Practice and Procedure* § 2854 at p. 240-41 (1995).

[10] *Warner v. City of Bay St. Louis*, 5th Cir., 526 F.2d 1211 (1976). The mistake was between 6 and 8 percent.

Here, the words of the stipulated judgment were clear, deliberate, and calculated. 7 percent interest until confirmation of sale is directed, with a per diem at that rate. The language was not mindless. A substantial change of financial liability from a fixed to variable interest rate is not permitted under Rule 60(a). It would materially change the original pronouncement and its direction. Such relief must be sought under Rule 60(b). BTC has not followed the proper path to remedy the problem.[11]

Considering the foregoing, no principles of law, cases, or misunderstood facts have been presented to warrant a change of the decision. The thrust of the reargument had been advanced and rejected previously. This motion, therefore, must be denied.

IT IS SO ORDERED.

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Richard F. Stokes, Judge

[11] BTC may decide to pursue Rule 60(b) relief. If so, the possible interplay between Titles 5 and 6 on the maximum judgment interest rate may be considered *de novo*. On the present record, this subject is not an issue. The irregularities affect the execution process, prejudice the defendant, and are unjust. The language of the stipulation plainly calls for a 7 percent rate of interest. A $63,000 overcharge exists. BTC admits the $27,000 error. A $90,000 cloud is not *de minimis*.

cc: Prothonotary
Robert T. Williamson, Esquire