IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DORA THEA WORD, individually and as parent and natural guardian of KERRON WORD, TIFFANY WORD and CORY WORD,	)	
Plaintiff,	)	Civil Action No. 99C-07-025J-MMJ
v.	)	
VIMALINI BALAKRISHNAN and JAMES BALASHINGHAM,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: February 5, 2004
Decided: April 13, 2004

John P. Daniello, Esquire, Maron & Marvel, P.A. *Attorneys for Plaintiff*.

C. Scott Reese, Esquire, Robert W. Mallard, Esquire, Cooch and Taylor, *Attorneys for Defendants.*

JOHNSTON, Judge

The following is the Court's decision concerning the Motion to Set Aside Default Judgment of Vimalini Balakrishnan and James Balashingham ("Defendants"). Defendants' motion stems from the default judgment granted in favor of Dora Thea Word ("Plaintiff") and her minor children on August 17, 2003.

Procedural Context

The initial complaint was filed by Plaintiff on July 2, 1999, for personal injuries suffered by Ms. Word's minor children. The complaint alleges that the children were exposed to lead-based paint while residing in property owned by Defendants ("Wilmington Property"). Plaintiff sued Defendants for negligence, nuisance, breach of implied warranty of habitability, misrepresentation, and infliction of emotional distress.

The Delaware Secretary of State was served on July 26, 1999, pursuant to 10 *Del. C.* § 3104 ("Personal jurisdiction by acts of nonresidents"). On August 11, 1999, Plaintiff filed a notice of service upon the Secretary of State, and a copy of the Summons and Complaint was sent by registered mail, return receipt requested, to Defendants at their last-known address: 3 Goldfinch Court, Toronto, Ontario, Canada, M2R 2C1. On August 27, 1999, return receipts, along with the envelopes

containing the notices, were received by Plaintiff's counsel from postal authorities showing non-delivery at Defendants' last-known address.

Plaintiff subsequently amended the Complaint, pursuant to Superior Court Civil Rule 4(h) and 10 *Del. C.* § 3104, alleging that Defendants are nonresidents. On November 1, 1999, Plaintiff again made service upon the Secretary of State pursuant to 10 *Del. C.* § 3104. On November 16, 1999, Plaintiff again filed a notice of service upon the Secretary of State, and a copy of the Summons and Complaint was sent by registered mail, return receipt requested, to Defendants at 122 Bunchberry Way, Brampton, Ontario, Canada, L6R 2E7. On December 7, 1999, Plaintiff's counsel received the undelivered notice for Defendant Balakrishnan marked "R.T.S." On December 8, 1999, Plaintiff's counsel received the undelivered notice for Defendant Balashingham marked "R.T.S." with no further information provided. Plaintiff again served the Secretary of State on February 28, 2000, with notice of service by registered mail to the Brampton, Ontario address filed on March 28, 2000. In May 2000, Plaintiff's counsel received the undelivered notices for both Defendants marked "Refused by Addressee."

On May 9, 2000 and June 1, 2000, after several attempts at service and motions for enlargement of time, Plaintiff filed Amendments to the Complaint pursuant to 10 *Del. C.* § 3104. The amended complaint stated that Defendants refused to accept

the service by registered mail. On August 17, 2002, this Court granted Plaintiff's Motion for Default Judgment. The Court held an Inquisition Hearing on February 6, 2002. On March 26, 2002, this Court awarded damages to Plaintiff in the amount of $325,000.

A Sheriff's Sale was scheduled for June 10, 2003, to foreclose on the default judgment by selling property that Defendants owned in Newark, Delaware ("Newark Property"). Upon application of Defendants, on June 6, 2003, the Sheriff's Sale was stayed. Plaintiff moved to lift stay on January 20, 2004. Subsequent to that motion, however, by agreement of the parties, the Newark property was sold to third-party purchasers. The sale proceeds have been placed in escrow as security. Therefore, Plaintiff's motion to lift the stay is moot and has been withdrawn. At this time, the Court need only rule on Defendants' motion to set aside the default judgment.

Adequacy of Service of Process

Defendants contend that the default judgment against them must be set aside because service was insufficient. Defendants claim they did not receive any notice of: the default judgment entered against them, the Inquisition Hearing, the levy against the Newark Property, or the Sheriff's Sale.

Defendants have moved to vacate the default judgment under the theory that their conduct was "mistake, inadvertence, or excusable neglect" pursuant to Superior

Court Civil Rule 60(b)(1). Defendants claim they never had notice of either the complaint or of any subsequent legal proceedings. Defendants contend that the letters served by Plaintiff were either sent to an incorrect address or not sent to the Defendants at all.

Defendants allege that they did not find out about the case instituted against them until they received a phone call from their tenant in the Newark Property about the scheduled Sheriff's Sale. At that time, they discovered the basis for the complaint and that default judgment had been entered for injuries to Ms. Word's three children caused by exposure to lead paint.

The record, however, is inconsistent with Defendants' contentions. The envelopes containing the notices were returned to Plaintiff's counsel from postal authorities on August 27, 1999, December 7, 1999, December 8, 1999, May 4, 2000 and May 31, 2000, marked "Return to Sender" or "Refused by Addressee." Defendants do not dispute that the Ontario address is and was their correct address. Section 3104 provides that "the notation of refusal shall constitute presumptive evidence that the refusal was by the defendant or the defendant's agent." It appears to the Court, therefore, that Defendants simply ignored repeated efforts at service of process.

Motions to open and set aside judgments are addressed to the discretion of the Court.[1] Public policy favors that actions be determined on their merits and that doubts about a petition be resolved in the petitioner's favor.[2] Default judgments must be set aside for insufficient service of process.[3]

Section 3104(g) establishes the requirement that "proof of the nonreceipt of the notice by the defendant or his agent" is to be provided by a plaintiff in order to determine whether the service of process was correctly performed.[4] In *York Federal*

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[1] *See Battaglia v. Wilmington Savings Fund Society*, 379 A.2d 1132, 1135 (Del. 1977); Superior Court Civil Rules 55(c) and 60(b).

[2] *See Cohen v. Brandywine Raceway Association*, 238 A.2d 320, 325 (Del. Super. 1968); *Kaiser-Frazer Corp. v. Eaton.*, 101 A.2d 345, 353 (Del. Super. 1953).

[3] *See Richards v. Hammon*, 178 A.2d 140, 144 (Del. 1962).

[4] 10 *Del. C.* § 3104(g) provides:

The plaintiff or the plaintiff's counsel of record in the action may within 7 days following the return of any undelivered notice mailed in accordance with subsection (d) of this section other than a notice, delivery of which is known by the notation of the postal authorities on the original envelope to have been refused by the defendant or his agent, file with the court in which the civil action is commenced proof of the nonreceipt of the notice by the defendant or his agent, which proof shall consist of the usual receipt given by the post office at the time of mailing to the person mailing the registered article containing the notice, the original envelope of the undelivered registered article and an affidavit made by or on behalf of plaintiff specifying:

(1) The date upon which the envelope containing the notice was mailed by registered mail;

(2) The date upon which the envelope containing the notice was returned to

(continued...)

Savings and Loan Association v. Heflin,[5] this Court ruled that in order for the Court to deny defendant's motion to vacate default judgment, the Court first would have to conclude that service of process was correctly performed. If service of process was correctly performed, the Court then must determine if due process was violated by the fact that defendants did not claim their registered mail.[6] The *Heflin* Court held:

> [D]ue process is met where "the statute makes a reasonable provision for probable communication to the defendant of notice of institution of suit." . . .
>
> > If the statute makes provision for reasonable communication, it is constitutional; and if there is compliance with the statute in the service of the notice, the service is valid. . . .
>
> I find that where plaintiff followed the statute and sent notice to defendants' address, due process is not violated by the fact that defendants did not actually claim the delivery of the registered mail. . . . Based on the foregoing, I hold that the default judgment is valid.

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[4](...continued)
the sender;

(3) That the notice provided for in subsection (d) of this section was contained in the envelope at the time it was mailed; and

(4) That the receipt, obtained at the time of mailing by the person mailing the envelope containing the notice, is the receipt filed with the affidavit.

[5]1995 WL 717288 (Del. Super. 1995) (*citing The C.I.T. Group/Equipment Financing, Inc. V. Chaney*, Del. Super., C.A. No. 88C-SE-102, Babiarz, Jr. (February 8, 1991) at 2).

[6]*York Federal Savings and Loan Assoc. v. Heflin*, 1995 WL 717288 at *2.

In the present case, as in *Heflin*, the facts are undisputed that plaintiff took each step 10 *Del. C.* § 3104(g) required in order to obtain jurisdiction over defendants through proper service.

Properly addressed mail is presumed to be received by the addressee.[7] Although this presumption can be rebutted, "the addressee's mere denial of receipt is generally not enough to rebut."[8] Defendants have not alleged any problem with the regular receipt of their mail. Defendants' contention that the notices mailed were either ineffective because they were sent to the wrong address, or were not truly refused because there was no return receipt green card attached to the envelope, amount to mere denial.

The Court also considers that a Notice of Lien Holders posted on the Newark Property was mailed to Defendants on May 28, 2003 at the same address as the original Notice of Summons and Complaint. That Notice was signed on June 6, 2003 by Defendant Balashingham.

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[7] *Id.* at *3 (*citing State ex rel. Hall v. Camper*, 347 A.2d 137, 139 (Del. Super. 1975).

[8] *Id.* (*citing Jackson v. Unemployment Ins. Appeal Bd.*, Del. Super., C.A. No. 85A-NO-9, Bifferato, J. (Sept. 24, 1986) at 3. *Accord Brown v. City of Wilmington*, Del. Super., C.A. No. 95A-01-007, Silverman, J. (Sept. 21, 1995).

Defendants regularly receive mail at the address, 122 Bunchberry Way, Ontario, Canada. Defendants have not rebutted the presumption that they received the notices of delivery of the registered mail, nor have they advanced any reason for ignoring the service of documents. Therefore, the Court concludes that Defendants intentionally refused the original Notice of Summons and Complaint, and had actual notice of the litigation.

Rule 60(b) Factors

Superior Court Civil Rule 60(b) provides that a Court "may relieve a party . . . from a final judgment, order, or proceeding for . . . : (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."[9] The decision to vacate a default judgment is within the sound discretion of the court.[10] Delaware public policy favors deciding cases on the

[9]The language of Delaware Rule 60(b) is taken almost verbatim from Federal Rule of Civil Procedure 60(b). Federal Courts have observed that discretion "ordinarily should incline toward granting rather than denying relief, especially if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2857 (2d ed. 1995). *See also Wagstaff-El v. Carlton Press Co.*, 913 F.2d 56, 57 (2d Cir. 1990).

[10]*Battaglia v. Wilmington Savings Fund Society*, 379 A.2d 1132, 1135 (Del. 1977).

merits, leading to the inference that "[a]ny doubt should be resolved in favor of the petitioner."[11] Delaware Courts generally construe Rule 60(b) liberally.[12]

In deciding whether to vacate default judgment, the Court also must consider: (1) whether the defaulting party can show the outcome might have been different (i.e. that the party has a meritorious defense); and (2) whether the non-defaulting party would be substantially prejudiced by vacating the judgment.[13] The defaulting party need not show definitively that there would have been a different result, just that there is the possibility of a different result.[14] If vacating the decision will result in prejudice to the non-defaulting party, the court may remedy the prejudice by imposing terms or conditions, such as an award of attorney's fees, as part of the order to vacate.[15]

It is not disputed that in April 1993, in preparation for leasing the Wilmington Property, the City of Wilmington, Department of Licenses and Inspection, inspected

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[11] *Model Finance Co. v. Barton*, 188 A.2d 233, 235 (Del. Super. 1963).

[12] *See Robins v. Garvine*, 136 A.2d 549, 552 (Del. 1975)(following the Federal courts' policy of according the rule liberal construction).

[13] *Battaglia v. Wilmington Savings Fund Society*, 379 A.2d 1132, 1135 (Del. 1977).

[14] *Williams v. DelCollo Electric, Inc.*, 576 A.2d 683, 687 (Del. Super. 1989).

[15] *See id.*; *Battaglia*, 379 A.2d at 1136; Super. Ct. Civ. R. 60(b)("and upon such terms as are just, the Court may relieve a party . . . from a final judgment").

the Wilmington Property for lead paint. Defendants were required to remove and encapsulate the lead paint found in the house.

An inspection of the Wilmington Property was conducted on April 29, 1993. On May 18, 1993, the Department of Licenses and Inspection issued a Compliance Notice that the Wilmington Property was in reasonable compliance with the codes which the department is empowered to enforce. Specifically, the Compliance Notice stated that the lead-based paint had been satisfactorily removed from window sills, window frames, doors and door frames. The Compliance Notice allowed Defendants to proceed with renting the Wilmington Property.

The results of the Notice subsequently were contradicted by the Lead Paint Inspection Report issued by Delaware Health and Social Services, Division of Public Health, regarding the Wilmington Property on August 26, 1997. According to the 1997 report, levels of lead hazardous to young children were found on casings or sills of windows and doors of the Wilmington Property.

The 1993 statement in the Compliance Notice contains a "Disclaimer of Warranty: This notice shall not be construed as a warranty or guarantee by the City of Wilmington, or by its agents, the Department of Licenses & Inspection." Additionally, HUD-52580 (9-81), a form included as part of Exhibit B to the Complaint, provides:

> LEAD PAINT: OWNER CERTIFICATION
> If the owner is required to treat or cover any interior or exterior surfaces, the PHA must obtain certification that the work has been done in accordance with such requirements prior to the execution or renewal pf any HAP contract. No reinspection is necessary if certificate is obtained.

It is apparent to the Court that this case involves questions of fact. It is possible that the outcome of a trial could have been in favor of Defendants.

With regard to possible prejudice to Plaintiff should the default judgment be vacated, this action was filed almost five years ago on July 2, 1999. Defendants evaded service until seeking to set aside the Sheriff's Sale on June 6, 2003. It was only after Defendants realized that they were facing the imminent loss of the Newark Property that they entered this appearance.

Additionally, as part of the inquisition hearing, this Court considered evidence that Plaintiff's children had indeed suffered injury from lead paint and that dangerous levels of lead paint were found in the Wilmington Property owned at that time by Defendants. Balancing potential prejudice, this factor weights in favor of upholding the default judgment in favor of Plaintiffs.

Even though Defendants may have at one time had a meritorious defense and Delaware public policy favors deciding cases on the merits, Defendants' intentional and willful conduct in simply ignoring service of process cannot be overlooked by the

Court. Defendants' lengthy delay in participating in this litigation constitutes waiver of their right to present any defense on the merits.

Conclusion

Plaintiff repeatedly took each step necessary to obtain jurisdiction over Defendants through proper service. Plaintiff complied fully with the requirements set forth in 10 *Del. C.* § 3104 and Superior Court Civil Rule 4. Due Process is satisfied by compliance with the reasonable statutory requirements and procedures established by the Court. Properly addressed mail is presumed to be received by the addressee. Defendants have failed to present evidence of nonreceipt. Instead, Defendants have relied on a general denial of receipt. Mere denial is insufficient to rebut the presumption that Defendants simply refused to claim their registered mail. The Court finds that Defendants were properly served.

THEREFORE, Defendants' Motion to Vacate the Default Judgment is hereby **DENIED**.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston

ORIGINAL: PROTHONOTARY'S OFFICE - CIVIL DIV.