

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DOROTHY E. CLARKSON and)
ELIZABETH F. DINSMORE,)

Plaintiffs,)

v.)

C.A. No. 04C-03-109 MMJ

SELMA GOLDSTEIN in her individual)
capacity, and ON BEHALF OF THE)
ESTATE OF LOUIS GOLDSTEIN,)

Defendants.)

SELMA GOLDSTEIN,)

Counterclaim Plaintiff,)

v.)

DOROTHY E. CLARKSON and)
ELIZABETH F. DINSMORE,)

Counterclaim Defendants.)

SELMA GOLDSTEIN,)

Third-Party Plaintiff,)

v.)

ERISMAN & VAN OGTROP,)

Third-Party Defendant.)

MEMORANDUM OPINION

***Upon Defendants' Motion and Application for Leave to Pursue a
Statute of Limitations Defense and
Motion for Relief from Judgment or Order***

Submitted: April 6, 2006

Decided: June 30, 2006

Deborah I. Gottschalk, Esquire, Eliza Morgan Hirst, Esquire, Community Legal Aid Society, Wilmington, Delaware, *Attorney for Plaintiffs.*

Michael F. Bonkowski, Esquire, Saul Ewing, Wilmington, Delaware, *Attorney for Defendants.*

This is an action brought by Plaintiffs Elizabeth F. Dinsmore and Dorothy E. Clarkson alleging claims of fraud, conversion, and violation of the Delaware Prohibited Trade Practices Act (“DPTPA”).¹ Plaintiffs seek return of all money paid to Defendants Selma Goldstein² and the Estate of Louis Goldstein in excess of the amount Defendants paid, if any, toward the existing mortgage on property located at 1200 West 3rd Street, Wilmington, Delaware (“Property”). Plaintiffs also seek enhanced civil penalties under the DPTPA³ in connection with the sale of the Property.

Plaintiffs filed motion for summary judgment. After extensive briefing and oral argument, the Court issued its opinion dated May 31, 2005. The Court ruled:

Plaintiffs’ Motion for Partial Summary Judgment is hereby **GRANTED**. The Court finds that Louis and Selma Goldstein perpetrated common law fraud against Mrs. Dinsmore and Ms. Clarkson, and that the fraudulent conduct was in violation of Delaware’s Prohibited Trade Practices Act, and Delaware’s Deceptive Trade Practices Act. Plaintiffs are entitled to: (1) compensatory damages in the amount of Plaintiffs’ payoff liability in the Bank One Mortgage foreclosure proceedings, and attorneys’ fees incurred as a part of the foreclosure proceedings; (2) enhanced civil penalties pursuant to 6 *Del. C.* § 2581(a) in the amount of \$20,000 (\$10,000 against each Defendant); (3) treble damages pursuant to 6 *Del. C.* §

¹6 *Del. C.* §§ 2511 *et seq.*

²On May 9, 2006, Selma Goldstein was brutally murdered.

³6 *Del. C.* §§ 2580(a), 2581(a).

2533(c) of three times compensatory damages; and (4) reasonable attorneys' fees pursuant to 6 *Del. C.* § 2533(b).

IT IS SO ORDERED.

On May 31, 2005, the Court granted the motion of counsel for Defendants to withdraw from the representation. At the hearing on the motion to withdraw, the Court directed Defendants' now-former counsel to forward the May 31, 2005 opinion to Defendants. On June 13, 2005, the son of Defendant Selma Goldstein emailed Defendants' former counsel, stating: "I just found out that we lost the [motion for summary judgment]. Please call me." The opinion was mailed to both Selma Goldstein and her son, Steven M. Goldstein, Esquire (a member of the Delaware Bar), on June 13, 2005.

Defendants obtained new counsel on October 12, 2005. Eight and a half months after the opinion was issued, and over four months after Defendants retained new counsel, Defendants filed a pleading styled "Motion and Application for Leave to Pursue a Statute of Limitations Defense and Motion for Relief from Judgment or Order." Defendants argue that because the statute of limitations defense was not at issue in the briefing on the summary judgment motion, the parties did not address the merits of Defendants' affirmative defenses.

Additionally, Defendants assert that the statute of limitations defense was properly

asserted in their amended answer and counterclaim. Therefore, Defendants claim that pursuant to Superior Court Civil Rule 8(c), the statute of limitations defense was validly asserted and has not been waived.

The Court finds that Defendants timely asserted the affirmative statute of limitations defense. Nevertheless, it would have been prudent and far preferable for Defendants to have argued the defense in connection with the summary judgment briefing. Although Defendants were not legally obligated to raise the defense at that time, failure to do so has resulted in an inefficient use of judicial resources.

Defendants also argue that they are entitled to relief pursuant to Rule 60(b)(1) and (6) on the basis of “excusable neglect” or “any other reason justifying relief from the operation of the judgment.” While Rule 60(b) provides no time limit for moving to vacate a judgment entered without jurisdiction, such motions should not be entertained if brought after an unreasonable delay.⁴ Although Defendants did not receive notice of the judgment immediately, the opinion was sent to Defendants within 2 weeks. Defendants then waited over eight months to file a motion. This is an unreasonable delay. Relief under Rule 60(b) is a unique

⁴*Ramirez v. Rackley*, 70 A.2d 18, 21-22 (Del. 1949).

remedy and requires a showing of extraordinary circumstances.⁵ Carelessness and negligence are not excusable neglect. Defendants' have failed to demonstrate the existence of any extraordinary circumstances justifying Rule 60 relief. However, having found that the statute of limitations defense was properly asserted and not waived, the Court need not decide whether to permit Defendants to pursue the defense on the basis of Rule 60.

CONCLUSION

Defendants asserted the statute of limitations defense in their amended answer and counterclaim. Although the defense could have and should have been raised as part of the summary judgment briefing and argument, the Court finds that Defendants have not waived their right to pursue the statute of limitations defense.

All other matters previously briefed and argued, and subsequently resolved by the May 31, 2005 Memorandum Opinion, however, are now *res judicata*. Defendants have failed to demonstrate any basis for relief under Superior Court Rule 60. Defendants will not be permitted to reargue any factual or legal issues considered as part of Plaintiffs' Motion for Partial Summary Judgment.

Defendants shall have thirty (30) days from the date of this opinion within which to file an appropriate motion on the issue of the statute of limitations

⁵*Dixon v. Delaware Olds, Inc.*, 405 A.2d 117, 119 (Del. 1979).

defense. Should Defendants fail to file such a motion within the allotted time, the statute of limitations defense shall be deemed waived.

IT IS SO ORDERED.

The Honorable Mary M. Johnston