IN THE SUPREME COURT OF THE STATE OF DELAWARE

KHYON ERNEST CHURCH,	§	
	§	No. 239, 2008
Defendant Below-Appellant,	§	
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	in and for New Castle County
BANK OF NEW YORK, as Trustee for the Holders of the EQCC Asset Backed Certificates Series 2001-1F,	§	C.A. No. 07L-01-084
	§	
	§	
	§	
Plaintiff Below-Appellee.	§	

Submitted: August 22, 2008
Decided: October 3, 2008

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 3rd day of October 2008, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Khyon Ernest Church, filed an appeal from the Superior Court's April 14, 2008 order denying his motion to vacate default judgment. We find no merit to the appeal. Accordingly, we affirm.

(2) The record reflects the following. On June 29, 2006, plaintiff-appellee Bank of New York (the "Bank") filed a scire facias sur mortgage ("foreclosure") complaint regarding the property at 1725 W. 2nd Street, Wilmington, Delaware (the "property"). After several unsuccessful attempts

at service upon Church, the Bank voluntarily dismissed the complaint without prejudice. A new complaint was filed on January 17, 2007. On January 18, 2007, a Notice to Tenants and Lienholders was sent certified mail to the property address.

(3) The New Castle County sheriff unsuccessfully attempted service of the new complaint on February 2, 2007, February 7, 2007, and February 8, 2007. On February 15, 2007, the writ was returned "non est." An alias praecipe and summons were issued, but, on May 17, 2007, the writ again was returned "non est." On that date, the sheriff posted the writ on the property and, on May 23, 2007, sent a copy of the writ by first-class and certified mail to Church.

(4) Default judgment was entered against Church on June 14, 2007. Sale of the property was scheduled for September 11, 2007. On August 23, 2007, a second Notice to Tenants and Lienholders was sent by certified mail to the property address and, on August 24, 2007, the property was posted with the notice. Sale of the property was stayed when, on September 7, 2007, Church entered into a forbearance agreement with the Bank.

(5) On December 6, 2007, Church filed a motion to vacate the default judgment, but failed to request a hearing. He filed a second motion on March 6, 2008, with a hearing on the motion to take place on March 24,

2008. Because the Bank did not receive notice of the hearing, only Church appeared. The record reflects that, on March 24, 2008, the Superior Court judge informed Church that his motion was deficient and urged him to correct the deficiencies prior to the re-scheduled hearing on April 14, 2008.

(6) Both parties appeared at the April 14, 2008 hearing. Upon questioning by the Superior Court, Church confirmed that he had failed to correct the deficiencies in his motion. Concluding that the Bank had fully complied with the procedures for service required by the Superior Court Rules in a foreclosure action and that Church had offered no valid challenge to the Bank's actions or to the entry of the default judgment, the Superior Court denied his motion to vacate the default judgment.

(7) In this appeal, Church claims that the Superior Court improperly denied his motion, since he demonstrated that he had not been properly served with the foreclosure complaint. He further claims that the filing of the second complaint and the entry of the default judgment by the Bank constituted "newly discovered evidence" justifying the vacation of the default judgment pursuant to Rule 60(b). Church, finally, claims that the Superior Court denied his motion with a closed mind.

(8) Superior Court Rule 4(f) (4) provides that, in a foreclosure proceeding, service is complete upon the return of two consecutive writs

along with the certification by the sheriff that he has posted a copy of the alias writ on the subject property and has mailed a copy of the alias writ by both certified mail and first class mail to the last known address of the defendant.[1] Because the record reflects that the procedures utilized by the Bank for service upon Church fully complied with the requirements of Rule 4(f) (4), we conclude that Church's claim that he had not been properly served is without merit.

(9) Moreover, Rule 60(b) is not available to Church because the second complaint and the default judgment, which were both matters of public record, do not constitute "newly discovered evidence" under that Rule.[2]

(10) Finally, there is no evidence in the record that the Superior Court ruled on Church's motion with a closed mind. To the contrary, the record reflects that the Superior Court afforded Church the opportunity to amend the deficiencies in his motion, but that Church failed to do so. In the absence of any evidence that service was improper or that the default

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[1] *Shipley v. First Fed. Sav. & Loan Ass'n. of Del.*, 619 F. Supp. 421, 438 (D. Del. 1985) (A mortgagor is denied due process under Delaware law in a scire facias proceeding unless an effort is made to provide the mortgagor actual notice by mail prior to entry of a default judgment).

[2] *Bachtle v. Bachtle*, 494 A.2d 1253, 1255-56 (Del. 1985) (In order for evidence to qualify as newly discovered evidence it must have been in existence and hidden at the time of the judgment).

judgment should be vacated, the Superior Court had no option but to deny Church's motion to vacate the default judgment.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice