IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN P. DiSABATINO,	§	
	§	No. 553, 2006
Respondent Below,	§	
Appellant,	§	Court Below: Family Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
CHRISTINA L. DiSABATINO,	§	C. A. No. CN04-07920
	§	
Petitioner Below,	§	
Appellee.	§	

Submitted: February 28, 2007
Decided: March 16, 2007

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

O R D E R

This 16th day of March 2007, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Benjamin DiSabatino ("Husband") appeals from a Family Court order denying his motion to reopen a default judgment directing a property division between Husband and his former spouse, Christina DiSabatino ("Wife"). Husband contends that the Family Court's default judgment was not the result of an orderly and logical deductive process. Because we find that the Family Court's decision is supported by the record and reflects a logical and orderly reasoning process, we affirm.

2. Husband and Wife married in 1980. During the marriage, Husband and Wife owned and operated a family business, Sunset Lake Construction Company. In January 2005 they were divorced, ending a marriage of over twenty-four years. Family Court retained ancillary jurisdiction over property division, alimony, child support, child custody and attorney fees and costs.

3. A pretrial conference and a property division hearing were scheduled for November 8, 2005 and December 19, 2005, respectively. The parties had notice of the pretrial and property division dates, as well as their responsibility to prepare for these dates and the possible sanctions for failure to comply, by virtue of the trial court's ancillary scheduling order of April 8, 2005. The original pretrial conference and property division hearings were later rescheduled to May 15, 2006 and June 21, 2006, respectively.

4. At issue was the control and the ultimate disposition of the parties' construction business. By stipulation and order entered by the Court of Chancery on August 10, 2004, the parties concluded the Court of Chancery litigation, and thereby resolved the issue of control of the business. The Court of Chancery order resulted in Husband having day-to-day operation of the business and in an agreement that the ownership issue would be resolved by the Family Court in the pending property division proceeding.

5. During the pendency of the property division, there were ongoing discovery issues between the parties. One such issue arose out of the parties' agreement to be vocationally evaluated in order to determine their respective earning capacities. Wife moved to compel Husband to schedule an appointment with the vocational expert. She also moved to schedule the Husband's deposition. The Family Court denied Wife's motion, but confirmed that Husband's deposition and vocational evaluation had both been scheduled. Later, however, Husband failed to appear for both the scheduled evaluation and for his deposition.

6. Another discovery issue involved Husband's receipt, expenditure, and accounting for over $500,000 in sale proceeds he received and retained from the sale of a marital asset. Because of Husband's failures to cooperate during discovery, Wife filed a motion for sanctions and for default judgment on May 11, 2006. In response, Husband's counsel represented to the trial court that, although the motion was mailed to Husband's former counsel on May 11, 2006, Husband did not actually receive Wife's motion until May 15, 2006, because May 13 and 14, 2006 fell over the weekend.

7. On May 15, 2006, Wife, Wife's counsel and Husband's former counsel appeared for the scheduled pretrial conference. Husband, however, failed to appear. The Family Court entered a default order against Husband, and denied Husband's later motion to open the default judgment on June 16, 2006. As the trial

judge explained, the default order was entered based not only on Husband's failure to appear at the scheduled pretrial conference but also because he intentionally failed to cooperate with discovery and to apprise the court and his own attorney of his situation.

8. Husband moved for reargument and clarification to reopen the default judgment. That motion was denied. The sole issue on appeal is whether the Family Court erred in denying Husband's motion to reopen the default judgment.

9. On appeal from a Family Court order, this Court's scope of review "extends to a review of the facts and law as well as to a review of the inferences and deductions made by the Trial Judge."[1] The Family Court's findings of fact will not be disturbed if they are supported by the record and are the product of an orderly and logical reasoning process, even though independently this Court might have reached different conclusions.[2]

[1] *Wife (J.F.V) v. Husband (O.W.V., Jr.)*, 402 A. 2d 1202, 1204 (Del. 1979).

[2] *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

10. A decision to reopen a default judgment under Rule 60(b)[3] rests in the sound discretion of the trial court.[4] In *Donohue v. Donohue*,[5] this Court adopted a three-pronged test to determine whether a trial court ruling on a Rule 60(b) motion is erroneous: (1) whether the conduct by the moving party that resulted in the default judgment (or order of dismissal) was the product of excusable neglect; (2) whether the moving party has shown that the outcome of the action may be different if relief were granted; and (3) whether the nonmoving party will suffer substantial prejudice if the motion were granted.

---

[3] Family Court Civil Rule 60(b) provides that:

> (b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. -- On motion and upon such terms as are just, the Court may relieve a party or legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant any relief provided by statute, or to set aside a judgment for fraud upon the Court. The procedure for obtaining relief from judgments shall be by motion as prescribed in these Rules or by an independent action.

[4] *Reynolds v. Reynolds*, 595 A.2d 385, 389 (Del. 1991).

[5] 2005 Del. Lexis. 224, at *5 (Del. June 16, 2005).

11. *Donahue*'s second and the third prongs are satisfied in this case. The second prong inquiry is whether the outcome of the action may be different if the default judgment were reopened. To make that showing, the moving party must establish that he or she has a meritorious defense to the underlying action.[6] In *Morrow v. Morrow*,[7] the dispute involved property that the wife claimed she had purchased before marriage, and that therefore was not marital property under a prenuptial agreement. In support of his motion to set aside a default judgment, the husband argued that he had provided consideration for the property and that if the case were reopened, he could produce evidence to support this contention. The Family Court found that the husband had presented "a meritorious claim for Rule 60 purposes."[8]

12. This case, like *Morrow*, also involves a marital property division where Husband has a meritorious claim under Rule 60. In this case, the Family Court granted 100% of the marital property to Wife, even though Wife sought only 70%. If the default judgment were reopened, Husband would have a meritorious claim for at least 30% of the marital assets. Therefore, Husband has shown that the outcome of this action would be different if the default judgment were reopened.

---

[6] *Battaglia v. Wilmington Sav. Fund Soc.*, 379 A. 2d 1135 (Del. 1977).

[7] *Morrow v. Morrow*, 2006 Del. Lexis 109 (Del. Feb. 28, 2006).

[8] *Id.* at *8-9.

13. The third prong of the inquiry is whether substantial prejudice would result to Wife if the motion were granted. In matrimonial actions, "substantial prejudice can be shown to exist where the passage of time has impaired the nonmoving party's ability to present the merits of his or her claims."[9] In *Ravine v. Ravine*,[10] the wife claimed substantial prejudice because if the case were reopened, she would be required to pay thousands of dollars of interim alimony. Because there is no indication that wife's ability to litigate the alimony issue was in any way prejudiced by the four-month delay, the *Ravine* court refused to find that substantial prejudice would result from reopening the judgment.

14. In this case, Wife contends that Husband had excluded Wife from the family business, and then later abandoned the business. As a result, she claims, "a large number of outstanding corporate debts" may be incurred, including the "possibility of substantial tax liabilities." More specifically, Wife argues she will suffer substantial prejudice if the case is reopened, because these debts and tax liabilities would be borne by her as a director and the sole stockholder of the family business. Under *Ravine*, economic loss without more is not sufficient to constitute cognizable substantial prejudice; moreover, any economic loss would affect Wife only indirectly, since the business is a corporation. Nor is there any

[9] *Ravine v. Ravine*, 2006 Del. Lexis 99, at *8 (Del. Feb. 22, 2006).

[10] *Id.*

indication that the passage of time would affect Wife's ability to present the merits of her case. Therefore, it is highly doubtful that Wife would suffer substantial prejudice if Husband's motion were granted.

15. In any event, Husband has not satisfied the first prong of the *Donohue* test, under which the inquiry is whether Husband's conduct that resulted in his default judgment is attributable to excusable neglect. "Excusable neglect has been described as that neglect which might have been the act of a reasonably prudent person under the circumstances."[11] Carelessness and negligence do not necessarily rise to the level of "excusable neglect."[12] "A mere showing of negligence or carelessness without a valid reason may be deemed insufficient."[13] Moreover, because "negligence may be so gross as to amount to sheer indifference, to open and vacate [the] judgment upon such excuse would cease to give meaning to the words 'excusable neglect.'"[14]

16. Under Delaware law, "excusable neglect" exists if the moving party has valid reasons for the neglect—reasons showing that the neglect may have been the

[11] *Brannon v. LaMaina*, 1993 Del. Lexis 59, at *3 (Del. Feb. 9, 1993) (citing *Cohen v. Brandywine Raceway Ass'n*, 238 A.2d 320, 325 (Del. Super. 1968).

[12] *McDonald v. S & J Hotel Enters.*, 2002 Del. Super. Lexis 191, at *5 (Del. Super. Aug. 7, 2002).

[13] *Id.*

[14] *Id.*

act of a reasonably prudent person under the circumstances. In determining whether the moving party's neglect was "excusable," all surrounding circumstances may be considered.[15] In *Ravine*,[16] this Court found that the husband had established excusable neglect because he made a mistake of fact that prevented him from taking timely action and because his mental health issues compounded the problem. In *Morrow*,[17] the husband's failure to meet the deadline for submitting stipulated facts was found to constitute "excusable neglect" because (a) the parties continued to negotiate the stipulated facts after the deadline, (b) the husband's counsel drafted (but did not send) a letter informing the court of the delay, and (c) the husband had complied with all previous deadlines.

17. The facts at bar call for a different result. "[A] mere showing of negligence or carelessness without a valid reason may be deemed insufficient" to find the neglect is excusable.[18] In *Brannon v. LaMaina*,[19] the father moved for relief from a Family Court custody order on the ground of excusable neglect. Because the father did not move for relief until almost five months had elapsed,

---

[15] *Id.*

[16] 2006 Del. Lexis 99 (Del. Feb. 22, 2006).

[17] 2006 Del. Lexis 109.

[18] 2002 Del. Super. Lexis 191, at *5.

[19] *Supra,* at n. 11.

and failed to show a valid reason for the delay, the court held that the father's actions were "clearly not those of a reasonably prudent person" and did not constitute "excusable neglect."[20] Similarly, in *Waters v. Division of Family Services,*[21] the father sought relief from a Family Court order terminating his parental rights. The father argued that his failure to appear at the termination of parental rights hearing was excusable because at that time he was incarcerated and had not been properly served with notice of the hearing. The *Waters* court found that the father had been properly served, had failed to apply for a paternity test, and had failed to exercise his right to appeal from the original court order. Therefore, the father's inactions did not constitute "excusable neglect."

18. We find in this case that Husband's actions were not those of a reasonably prudent person, for three reasons. First, Husband repeatedly failed to comply with court orders, specifically: (a) for the taking of his deposition; (b) for his court-ordered vocational evaluation (Husband having canceled the vocational evaluation without any explanation); (c) for responding to Wife's repeated document production requests to account for the value he had received from the sale of marital assets; and (d) the trial court's order of December 13, 2005, directing Husband to appear at the pretrial conference scheduled for May 15, 2006.

[20] *Id.* at *3.

[21] 2006 Del. Lexis. 652 (Del. Dec. 12, 2006)

The record showed that Husband had actual notice of those court orders and had not misapprehended any facts. Here, as in *Brannon* and *Waters*, Husband exhibited great indifference to his case. And, unlike *Ravine*, Husband did not provide valid reasons for his failure to appear for the scheduled evaluation, deposition and pre-trial conference, and to respond to Wife's document production requests.

19. Because Husband's actions were clearly not those of a reasonably prudent person, his neglect was not excusable. Indeed, Husband's neglect was so "gross" as to "amount to sheer indifference." "[T]o open and vacate [the] judgment upon such excuse would cease to give meaning to the words 'excusable neglect.'"[22]

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[22]*McDonald v. S & J Hotel Enters.*, 2002 Del. Super. Lexis 191, at *5 (Del. Super. Aug. 7, 2002).