

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE		: CHAPTER 13
		:
ANGELINA JOHNSON		:
	DEBTOR	: BANKRUPTCY No. 01-17153SR
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ANGELINA JOHNSON		:
	PLAINTIFF	:
	V.	:
EMC MORTGAGE CORPORATION		:
	DEFENDANT	: ADVS. No. 02-0030
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OPINION

By: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE.

Introduction.

Before the Court is a motion on the part of Defendant, EMC Mortgage Corporation, (“EMC”), for relief from this Court’s Orders of October 9, 2002 and May 7, 2003. In the former Order the Court had entered summary judgment in favor of the Plaintiff/Debtor, Angelina Johnson, and found EMC liable for breaches of the Home Ownership and Equity Protection Act (“HOEPA”) 15 U.S.C. § 1639 and the Pennsylvania Unfair Trade Practice and Consumer Protection Law (“UDAP”) 73 P.S. § 201-1 *et seq.* In the latter Order, the Court reduced EMC’s secured proof of claim from the filed amount to \$9,061.74 and assessed damages against EMC for the Debtor’s legal fees and costs. An answer opposing EMC’s motion, with a cross motion for sanctions and to compel discovery, was filed by the Debtor. A reply to the cross motion has been filed by EMC. A hearing on these motions was held October 30, 2003. For the reasons which follow, the motion for relief under F.R.C.P. 60(b) will be granted, the motion for sanctions will be held under advisement, and the motion to compel discovery will be granted.

Background.

The background of this contentious and protracted litigation can be gleaned from the written opinions which accompanied the Orders from which EMC now seeks relief. The litigation, in general, concerns the Debtor's claim that EMC violated various consumer protection statutes in the course of refinancing the Debtor's mortgage loan. The Debtor was unsuccessful on some of her claims, but prevailed as noted above. The Court's liability finding of October 9, 2002, was entered upon motion of the Debtor for summary judgment, and was bifurcated from a damages ruling which came several months later following an evidentiary hearing. No appeal was taken from the Court's finding of liability, although cross-appeals were filed by the parties on the issue of damages. The appeals are pending in the District Court before the Honorable Timothy J. Savage.

On July 10, 2003, EMC sought a stay of the damages award pending resolution of the appeals. The Debtor opposed that request. On August 5, 2003 a hearing was held with respect to the stay request. At that hearing, in addition to advancing other arguments, EMC advised the Court that it had filed a motion for reconsideration of the Court's liability finding. The Court thereupon entered an Order staying proceedings pending an October 30, 2003 hearing on the reconsideration motion. At the October 30, 2003 hearing it was brought out that evidence of a certain written notice, the assumed non-existence of which had been a key predicate to the Court's liability finding against EMC, had recently been located by the Defendant. On the strength of this, EMC asked for relief from the liability finding. Following the October 30, 2003 hearing the court entered an Order staying all proceedings in this action pending resolution of EMC's request.

EMC relies primarily on F.R.C.P. 60(b)(1), which allows relief from a final judgment based upon mistake, inadvertence, surprise or excusable neglect. EMC also relies on F.R.C.P. 60(b)(3), which allows for relief where there has been fraud, misrepresentation, or other misconduct of an adverse party. On the latter score, EMC stresses that the Debtor has sworn in these proceedings that she was never given the notice in question, although the notice (Exhibit “C” to EMC’s motion), bears her signature acknowledging its receipt. Finally, EMC invokes F.R.C.P. 60(b)(6), which allows relief from judgment for any other reason which, in the discretion of the Court, justifies the same. Here, EMC emphasizes that the liability finding against it did not follow a trial on the merits, but came instead by way of a motion for summary judgment. EMC argues that material issues of genuine fact are implicated *vis a vis* its compliance with HOEPA, now that the missing notice has been located. A trial is warranted, it says, given that fact, as well as the magnitude of the damages which have been assessed against it.

The Debtor counters that the facts adduced at the October 30, 2003 hearing do not justify relief based upon inadvertence or excusable neglect. Further, says the Debtor, the mere existence of the missing HOEPA notice is irrelevant, because it was not timely provided to the Debtor in the manner required by the statute. In this regard, the Debtor denies that she has misrepresented to the Court anything having to do with the notice. The Debtor argues that the only significance to the belated discovery of the notice is that it proves beyond doubt that EMC failed to fully comply with an earlier discovery request to produce the document. The Debtor thus urges the Court to deny the motion to reconsider its prior Orders, dissolve any stay of proceedings, and sanction EMC for misconduct in the course of discovery.

The Court disagrees with the Debtor, finds EMC's motion to have merit, and will accordingly grant relief.

Discussion

In seeking relief, EMC relies most heavily on the excusable neglect prong of Rule 60(b). This phrase is not defined in the rules and Courts have struggled with its meaning. When applying Rule 60(b) courts must consider such factors as the need for finality, the preference for deciding cases on the merits, and whether prejudice would be worked on the non-moving party. *See 12 Moore's Federal Practice* § 60.22 [2] (Matthew Bender 3d ed.) Since the adoption of Rule 60(b) the largest body of case law to have evolved in connection with construction of the phrase "excusable neglect" has arisen in situations involving requests for relief from a judgment entered by default. In this context some courts define the term liberally, and routinely grant requests to vacate default judgments absent a showing of culpable conduct or bad faith. These courts focus primarily on the policy preferences of deciding cases on the merits and construing Rule 60(b)(1) liberally so as to accomplish justice.¹ The Third Circuit Court of Appeals has consistently adhered to this approach. *See, e.g., Gross v. Stereo Component Systems, Inc.*, 700 F.2d 120, 122 (3rd Cir. 1983)

The present case does not concern the opening of a default judgment, however there is at

¹ *See, e.g., Meadows v. The Dominican Republic*, 817 F.2d 517, 521 (stating that Rule 60(b) is remedial in nature and should be applied liberally so as to decide cases on the merits when possible); *Wagstaff-EL v. Carlton Press Co.*, 913 F.2d 56, 57 (2nd Cir. 1990) (vacating default judgment after weighing all relevant factors); *United Coin Meter Company, Inc. v. Seaboard Coastline Railroad*, 705 F.2d 839, 846 (6th Cir. 1983) (stating that federal courts favor trial on the merits); *Farnese v. Bagnasco*, 687 F.2d 761, 764 (3rd Cir. 1982) (stating doubts should be resolved in favor of deciding cases on the merits).

least one obvious parallel. As in the case of a default judgment, there has here been no trial on the merits of the parties' dispute. This case was decided on a motion for summary judgment. That being so, the Court must reiterate that the summary judgment motion was resolved in favor of the Debtor entirely for the reason that the only record evidence with respect to the HOEPA notice was the Debtor's denial of its receipt and EMC's inability to produce it. In its opinion, the Court specifically noted that evidence on this key point was slim, but concluded that the Debtor had nevertheless satisfied her burden or proof. The conclusion that no notice was furnished is, of course, now cast in some doubt, notwithstanding the Debtor's fall back argument that delivery of the notice was nevertheless flawed. Given the sharp contrast in the parties' positions concerning this important issue, the Court deems it appropriate, and entirely in the interest of justice, that all evidence on point be reconciled through a trial on the merits.

In reaching this conclusion, the Court observes that, as in cases wherein default judgments are liberally opened, the present factual setting reflects no willful misconduct or bad faith on the part of the movant. In the first instance, there is, of course, no logical reason why the Defendant would refrain from producing the notice in question had its existence been known. The Court thus harbors scant doubt as to EMC's good faith. The prior non-production of the notice seems clearly to have been the result of an inability to find the notice. The Debtor argues that EMC should be penalized and prevented from utilizing the notice because it failed to discover it earlier. In other words, the Debtor argues that the "neglect" in these circumstances is *inexcusable*. The Court disagrees.

At the October 30, 2003 hearing, the Court received evidence concerning the

background of the transaction in question. The original loan was made in 1995. EMC acquired the loan, through purchase and assignment in 2000, from the original lender, United Companies Lending Corporation. Certain hard copy documents came to EMC from United Companies Lending at the time of the assignment of the loan, and these were scanned by EMC upon receipt into a readily accessible online imaging system. The paper files sent to EMC, however, did not contain all of the original loan documents. Those they did not contain existed separately on micro-fiche. The micro-fiche files were sent upon receipt by EMC to an off-site archive. The HOEPA notice at issue herein is apparently among the loan documents on micro-fiche at the archive. A copy of the HOEPA notice was requested by the Debtor in the course of discovery in this litigation but, apparently through breakdowns in personnel training and personnel turnover, a search of the remote micro-fiche files was not conducted. It was consequently reported in response to discovery that no HOEPA notice could be found. EMC thereafter essentially conceded liability on the point. EMC now looks to retract that concession, arguing that its prior failure to have found the HOEPA notice constitutes excusable neglect. The Court agrees.

The United States Supreme Court has provided helpful guidance as to the proper construction of the term excusable neglect in bankruptcy cases. The determination of whether neglect is excusable, said the Court, is an equitable one, taking into account all circumstances surrounding a party's omission, including the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498 (1993). The Court believes that proper consideration of

these factors tilts in favor of granting EMC relief.

At the outset, it bears emphasis that EMC, as assignee, never itself actually failed to provide the Debtor with the subject HOEPA notice in violation of the statute. EMC's alleged liability is solely derivative based upon its purchase of the loan from United Companies Lending. For this reason, the Court believes that the interest of justice dictates closer scrutiny of whether a violation of the HOEPA statute, in fact, occurred. A trial on the merits would serve that end. EMC's request for such relief has been timely made, is in good faith and, with the possible exception of certain legal fees and costs incurred, granting relief will work no demonstrable prejudice upon the Debtor beyond that which flows naturally from having a judgment in one's favor vacated. Arguably EMC might have discovered the missing notice earlier, through the exercise of greater diligence. However, the failure to locate loan documentation, which arrived in stages, after an assignment, for use in defending a lawsuit filed two years after the assignment is not, in the Court's view, beyond understanding. Were the issue less central to the liability finding, a different result might obtain. The circumstances being what they are, however, the Court concludes that EMC's neglect, such as it was, will be excused so that proper consideration of the pivotal, albeit belated found document can be given. The disposition reached herein renders it unnecessary to address the remainder of the arguments made in support of and opposed to EMC's Motion for Reconsideration.

The Debtor's Motion for Sanctions will be held under advisement pending the outcome of trial. On this score, the Court observes that the ultimate consequences of EMC's belated discovery are difficult to ascertain at this time. For example, should the liability issue eventually be resolved in EMC's favor, then the question of damages will, of course, be rendered moot.

The Debtor, however, has already borne much of the expense of prosecuting her appeal of the damages award and defending against EMC's appeal. The Court does not lightly discount this expense and, should such a scenario follow, it would be appropriate to revisit the question of a monetary sanction against EMC for conduct, which while it may be excusable for purposes of F.R.C.P. 60(b), may nevertheless be of significant, measurable prejudice to the Debtor.

Although it will hold the sanctions motion under advisement, the Court, in any event, will grant the Debtor's Motion to Compel Discovery, and direct EMC to forthwith produce any and *all* remaining documentation with respect to the HOEPA notice which has not yet been provided to the Debtor.

An appropriate Order follows.

By the Court:

Stephen Raslavich
United States Bankruptcy Judge

Dated: November 19, 2003

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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ORDER

AND NOW, upon consideration of the Motion of EMC Mortgage Corporation, (“EMC”) for Relief from this Court’s Orders of October 9, 2002 and May 7, 2003, the Debtor’s Answer in opposition thereto and cross motion for sanctions and to compel discovery, EMC’s Reply to the Cross Motion, and after hearing held October 30, 2003, it is hereby:

ORDERED, that for reasons stated in the within Opinion, EMC Mortgage Corporation’s Motion for Reconsideration of this Court’s Orders of October 9, 2002 and May 7, 2003 be and the same hereby is Granted. The Court’s Order granting Summary Judgment in favor of the Debtor and against EMC Mortgage Corporation is hereby Vacated. The Court’s Order of May 7, 2003 awarding damages in favor of the Debtor and EMC is likewise Vacated. The parties are directed to take all appropriate steps to either dismiss the appeal of the Court’s damage award without prejudice, or alert the District Court that resolution of the appeal should be delayed pending the outcome of trial; and it is further:

ORDERED, that the Debtor’s Motion to Compel Discovery be and the same hereby is Granted. EMC shall forthwith produce to the Debtor any and all documentation related to a

written notice under the Home Ownership and Equity Protection Act which had not yet been provided to the Debtor; and it is further:

ORDERED, that the Debtor's Motion for Sanctions shall be held under advisement pending the outcome of trial in the above action, which trial shall be scheduled by the Court pursuant to separate Order.

BY THE COURT:

DATED: November 19, 2003

STEPHEN RASLAVICH
UNITED STATES BANKRUPTCY JUDGE

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