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IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

JEROME P. MISKEL, et al.,	)	**CASE NO. CV-2004-03-1388**
Plaintiffs	)	**JUDGE ELINORE MARSH STORMER**
vs	)	
OCWEN FEDERAL BANK FSB	)	**ORDER**
Defendant	)	

This matter is before the Court upon Defendant's, Ocwen Federal Bank's, Motion to vacate the Default Judgment and the award of Damages of $97,456 taken against it by this Court on May 13, 2004. Plaintiff has responded. The Court has considered the pleadings, Ohio R. Civ Proc 60(B), and applicable law.

APPLICABLE LAW

Ohio R. Civ. Proc. Rule. 60 governs relief from judgments or orders and states:

> On motion and upon such terms as are just, the court may relieve a party or his 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 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 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 (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

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> The procedure or obtaining any relief from judgment shall be by motion as prescribed in these rules.

GTE Automatic v. ARC Industries (1976), 47 Ohio St.2d 146, paragraph 2 of the syllabus.

Defendant has requested relief from judgment. The Supreme Court has held in several cases that Ohio R. Civ Proc.R. 60 (B) is a remedial rule worthy of liberal construction. Blasco v. Mislik (1982), 69 Ohio St. 2d 684, 685; *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St. 3d 18. However, when a party files a motion for relief from judgment, it is not automatically entitled to relief on the motion. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97. The decision whether to grant relief from judgment is addressed "to the sound discretion of the trial court". *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77.

Because the movant has the burden of proving that it is entitled to the requested relief, the movant must submit factual material that demonstrates on its face three things:

> (1) *Timeliness of the motion*. The motion must be filed within a reasonable time and for reason stated in Civ.R. 60(B)(1), (2), and (3) not more than one year after the judgment or order or proceeding was entered or taken.
>
> (2) *Defense*. The party has a meritorious defense if relief is granted.
>
> (3) *Reasons for seeking relief*. The party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5).

GTE Automatic v. ARC Industries, supra, 47 Ohio St.2d 146 at paragraph 2 of the syllabus.

Where there is any question whether or not a default judgment should be set aside, any doubt should be resolved in favor of the movant. *Svoboda v. Brunswick* (1983), 6 Ohio St. 3d 348, 351; *Miami Sys. v. Dry Cleaning Computer Sys.* (1993), 90 Ohio App. 3d 181, 185.

The Defendant's Motion is not well taken as to the Judgment but is as to the issue of damages. A hearing on the damages issue shall be held.

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ANALYSIS

In this case, the questions at issue are whether there are operative facts that demonstrate:

(1) *Timeliness of the motion*;

(2) *A meritorious defense*; and

(3) *Reasons for seeking relief under Civil Rule 60(B).*

1. *Timeliness of the Motion.*

Defendant Ocwen Federal Bank filed its Motion on October 26th, 2004 six months after the Court granted Plaintiff's Motion for Default Judgment, but only one month after it learned of the Judgment. Motions to Vacate under Civ. R. 60 (B)(1), alleging mistake, inadvertence, and/or excusable neglect must be brought "not more than one year after the judgment or order or proceeding was entered or taken. The Court finds that the filing of this action is within one year and thus clearly timely. The Court therefore finds that Defendant has satisfied the first prong of the *GTE* test.

2. *A Meritorious Defense.*

Plaintiff's claims arise from damages associated with false information contained on a credit report allegedly issued by the Defendant. The Defendant seeks to defend on the basis that Republic Bank assigned the loan to the Defendant and is really the party at fault in this suit.

In *Moore v. Emmanuel Training Center* (1985), 18 Ohio St. 3d 64, the Court held that a movant's burden under Civ. R. 60 (B) is merely to allege a meritorious defense, not to prevail on the merits of the claim.

Therefore, the Court finds that Defendant does in fact allege a meritorious defense in the present case. The Defendant has satisfied the second prong of the *GTE* test.

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The remaining issue is whether Defendant has demonstrated that it is entitled to relief under Civ.R. 60(B)(1) through (5).

3. *Grounds for relief under Civ.R. 60(B)(1) through (5).*

Pursuant to Civ.R. 60 (B)(1), the trial court may relieve a party from final judgment, order or proceeding on the grounds of "mistake, inadvertence, surprise or excusable neglect." Under Ohio law, "excusable neglect" is an elusive concept which has been difficult to define and to apply. See *Kay* at 18. There is no bright-line test to determine whether a party's neglect had been excusable or inexcusable; such a determination must be made from all the individual facts and circumstances in each case. *Rose Chevrolet v. Adams* (1988), 36 Ohio St. 3d 17, 21. The concept of excusable neglect nevertheless must be construed in keeping with the proposition that Civ.R. 60 (B)(1) is a remedial rule to be liberally construed with a view toward effectuating a just result. *State ex rel Citizens for Responsible Taxation v. Scioto Cty. Bd of Elections* (1993), 67 Ohio St. 3d 134, 136.

Lastly, the Ohio Supreme Court has consistently recognized that fundamental tenet that courts should decide cases on their merits, not on technicalities. *Hawkins v. Marion Corr. Inst.* (1986), 28 Ohio St. 3d 4, 5; *Perotti v. Ferguson* (1983), 7 Ohio St. 3d 1,3. This is especially true in cases where the amount of default granted is substantial. See *Colley at 249.*

It is undisputed that the Summons and Complaint were properly issued to the Defendant. From Defendant's assertion, it appears that the mistake or excusable neglect occurred between the forwarding of the Summons and Complaint to counsel and its reception by the Defendants.

The relevant facts indicate that the complaint was served on an Ocwen "administrative employee". The Ocwen employee did not follow company procedure for opening a database and sending the correspondence to in-house

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counsel. As a result, Ocwen alleges excusable neglect, as its counsel had no knowledge of the suit until September 2004.

While the Defendant rightly contends that an employee's failure to forward a complaint to the appropriate personnel may constitute excusable neglect, the Defendant still must set forth reasons for that employee's neglect if such neglect is indeed to be considered reasonable. See *Kay v. Glassman, Inc.*, 76 Ohio St. 3d 18 (1996). For this reason, the case at bar is distinguishable from *Kay*. Here, the Defendant asserts no excuse for its employee's incompetence. The controlling case is *Peters v. Vokas Provision Co.*, 1998 Ohio App. LEXIS 5028 (9th Dist.). In that case, the Defendant's employee received the complaint and never forwarded it to the Defendant; the Defendant offered no excuse for the employee's inactions. Consequently, the court upheld the default judgment as the Defendant did not show the requisite "excusable neglect". Id at *5.

The Court, in considering the totality of the facts and circumstances, finds that the Defendant has not established sufficient facts to set forth a case of "excusable neglect" under Civ.R. 60(B)(1).

Despite the foregoing, the Ohio Supreme Court has ruled that when a Defendant demonstrates that a Plaintiff has adduced insufficient evidence at the default hearing to justify a certain damage amount, the Defendant has satisfied his CRP 60(B) motion to the extent of challenging the amount awarded. Carr v. Charter National Life Insurance Co., 22 Ohio St. 3d 11 (1986).

In the case at bar, the Defendant challenges the Plaintiff's award of $97,456 ($62,439 in future medical expenses, $5,000 in past medical expenses for Plaintiff Debra, $1,903 for time spent correcting the false information forPlaintiff Jerome, $1,200 for Plaintiff Jerome's withdrawal and interest in retirement accounts, a total of $ 5,759 for Plaintiff Debra's withdrawal

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on her retirement account, $10,138.75 for a prepayment penalty in refinancing the home after credit report was corrected, refinancing closing costs of $5,540, pre-refinancing difference in interest rates resulting from the Defendant's slander- $4,910 (representing one year of extra interest 9.25% instead of 7.5%).

Coincidentally, Defendant argues damages should be reduced because the refinancing interest rate on Plaintiffs home is currently 6.75%, .75% lower than the interest rate Plaintiffs would have attained but for Defendant's actions, thus actually saving Plaintiffs $2,100 per year for the rest of the term. The Defendant further argues that Plaintiffs have failed to mitigate their damages by not waiting an additional year to refinance, so as not to incur the $10,138.75 and $5,540 pre-payment penalties.

Next, the Defendant alleges that the Plaintiffs' use of retirement accounts beyond the $4,900 difference in interest rates is not attributable to Defendant's actions, as that is all the immediate damage they caused.

The Defendant's major contention is the $62,439 in future medical expenses. The Plaintiffs did not bring forth any expert medical testimony, and the award appears to be solely based on Plaintiff-Debra's testimony that she will need tranquilizers and anti-depressants for the rest of her life due to her family's financial burdens.

With the standard being insufficiency of evidence produced at the default hearing, this court shall not consider any damage evidence that the Defendant is now presenting to the court. *Id.* To rule otherwise would render default proceeding meaningless.

The Plaintiffs have produced evidence showing differences in interest rates due to Defendant's slander, the need to refinance, withdrawals of retirement accounts related to Defendant's actions, reimbursement for 80 hours of time correcting Defendant's mistake, and past

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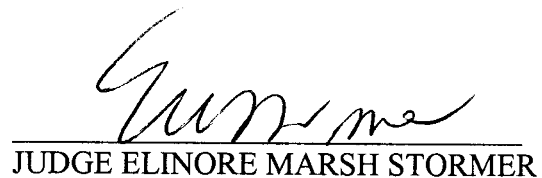
medical expenses closely after Defendants slander and on these the court will only consider the issue of whether or not the damages are in any way duplicative.

The majority of the Plaintiffs' award comes from the Plaintiff's claim of future medical expenses. The only evidence of this is the Plaintiff's testimony that she will need medication for the rest of her life. Conceding that Plaintiff is not an expert, her barebones assertion is insufficient to justify to any reasonable certainty supporting the award.

Upon due consideration, the Court hereby grants Defendant's Motion to Vacate the Default Judgment as to the amount of Damages only. A hearing shall be held, limited to this issue on Feb 18, 2005 at 9:00.

IT IS SO ORDERED.



JUDGE ELINORE MARSH STORMER

Atty. Augustin F. O'Neil
Atty. Clair Dickenson