

Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
Telephone (302) 255-0665

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Richard H. Cross, Jr., Esq.
Cross & Simon, LLC
913 North Market Street
11th Floor
Wilmington, DE 19801

Karen L. Tumer, Esq.
Eckert, Seamans, Cherin & Mellot
1515 Market Street, 9th Floor
Philadelphia, PA 19102

RE: CIVIL ACTION NO. 04C-06-258-JRJ
Victoria Gibbs, et al. v.
Fairbanks Capital Corporation, C.A.
Upon Defendant's Motion for Summary Judgment - DENIED

Before the Court is the motion for summary judgment of Defendant, Fairbanks Capital Corporation ("Fairbanks"). Fairbanks argues that the doctrine of *res judicata* bars recovery for the damages claimed by Plaintiffs, Victoria Gibbs, Clifford Gibbs, Andrew Holtz, Ramona Holtz, Jerome Houston, Glenda Houston, Ernestine Oney, Richard Smith, Kimberly Houston Thompson, and Thomas Dimes (collectively referred to as "Plaintiffs"). According to Fairbanks, because Plaintiffs are members of a class action suit in Massachusetts that involves the same parties and the same claims, *res judicata* precludes Plaintiffs from litigating those damage claims here. For the reasons set forth below, the Court finds that Fairbanks cannot assert *res*

judicata as an affirmative defense under the particular circumstances and therefore **DENIES** Fairbanks' motion for summary judgment.

FACTUAL AND PROCEDURAL HISTORY

The Plaintiffs in this action are residential mortgage customers of Fairbanks. On June 24, 2004, Plaintiffs sued Fairbanks for breach of contract, consumer fraud, violation of the Uniform Deceptive Trade Practices Act, and defamation. Plaintiffs allege that Fairbanks engaged in a scheme of unfair, unlawful, and deceptive business practices in servicing its residential mortgage loans. Plaintiffs further allege that Fairbanks intentionally placed customers in excessive debt by, *inter alia*, imposing hidden charges and improper late fees, misapplying payments, and collecting premiums for unnecessary homeowners' insurance policies.

When Fairbanks failed to answer the complaint, Plaintiffs moved for default judgment, which was granted by this Court on September 22, 2004. Fairbanks moved this Court to vacate that default judgment, arguing that Plaintiffs had served the wrong entity. The Court denied Fairbanks' motion, finding that Fairbanks had notice of Plaintiffs' complaint as early as September 28, 2004, when its then attorney, Thomas D.H. Barnett, determined that Plaintiffs had served the wrong defendant.¹

¹Mr. Barnett executed an affidavit on March 31, 2005, which confirmed that Plaintiffs' counsel advised him on September 22, 2004 that default judgment was entered against Fairbanks in the present action. At that time, Mr. Barnett represented Fairbanks in connection with mortgage foreclosures, but not for general representation. On September 28, 2004, Plaintiffs' counsel faxed Mr. Barnett the notice and motion for default judgment. On the same

The Court also found that Fairbanks, a foreign corporation authorized to transact business in Delaware, had failed to maintain a registered agent in Delaware, as required by 8 *Del. C.* § 132. Accordingly, this Court held that Fairbanks had not demonstrated excusable neglect or mistake that would warrant relief from default judgment.

Thirteen months later, Fairbanks filed the present motion for summary judgment, arguing that Plaintiffs' claims for damages are barred by the doctrine of *res judicata*. Fairbanks argues that because Plaintiffs are class members in a similar lawsuit in Massachusetts,² they cannot relitigate the same claims in this action. Fairbanks maintains that it is not asserting its defense of *res judicata* as to liability, but as a defense to Plaintiffs' damages claims. In response, Plaintiffs argue that the default judgment precludes Fairbanks from raising any affirmative defenses. In addition, Plaintiffs contend that Fairbanks waived any affirmative defenses by failing to file a timely answer to the complaint. Fairbanks counters that it did not waive the affirmative defense of *res judicata*, but raised the defense at the first opportunity to do so.

day, Mr. Barnett performed a search of the Delaware Secretary of State's records and determined that Plaintiffs had served the wrong entity. On September 29, 2004, Mr. Barnett faxed the notice and motion for default judgment to David Coleman, a representative of Fairbanks. Pls. Resp. to Def.'s Second Mot. to Vacate, D.I. 16, Ex. B, Aff. of Thomas D. H. Barnett.

²*Curry v. Fairbanks Capital Corporation*, No. 03-10895-DPW (D. Mass.).

DISCUSSION

The Court may enter default judgment against a party that fails to appear, plead or otherwise defend an action.³ A party may petition the Court for relief from default judgment pursuant to Rule 60(b).⁴ The Court has the discretion to vacate an order of default judgment if the moving party establishes the following “four essential elements: 1) that his conduct was that of a reasonably prudent person; 2) that the motion was not brought after an unreasonable delay; 3) the presence of a meritorious defense; and 4) the lack of substantial prejudice to the non-moving party.”⁵ Public policy prefers that a matter be decided on its merits, and therefore, Rule 60(b) is to be liberally construed.⁶ However, the burden remains on the movant to establish a basis for relief under Rule 60(b).⁷

³Super. Ct. Civ. R. 55(b). *See also Kuhn v. Selvocki*, 2004 WL 1535813, at **2 (Del. Supr.) (“Under Rule 55(b), default judgment may be entered when a party against whom a judgment for affirmative relief is sought has failed to appear, plead or otherwise defend.”).

⁴Rule 55(c).

⁵*Concors Supply Co., Inc. v. Berger*, 1988 WL 130437, at *2 (Del. Super.)(citing *Cohen v. Brandywine Raceway Association*, 238 A.2d 320 (Del. Super. 1968); *Keith v. Melvin L. Joseph Construction Co.*, 451 A.2d 842 (Del. Super. 1982); *Farmers Bank of the State of Delaware v. Jones*, Del. Super., C.A. No. 79C-SE-105, Christie, J. (1982)).

⁶*Keystone Fuel Oil Co. v. Del-Way Petroleum, Inc.*, 364 A.2d 826, 828 (Del. Super. 1976)(citing *Model Finance Model Finance Co. v. Barton*, 188 A.2d 233, 234-235 (Del. Super. 1963)).

⁷*Weeks v. Wilson*, 1990 WL 84695, at *1 (Del. Supr.)(citing *Battaglia v. Wilmington Sav. Fund Soc’y.*, 379 A.2d 1132 (Del. 1977)) (“While the rule will be given a liberal construction because of the underlying policy, which favors a trial on the merits, the burden is upon the movant to establish the basis for relief.”).

In this matter, the Court entered default judgment against Fairbanks for its failure to answer the complaint. The Court denied, with prejudice, Fairbanks' motion for an order vacating that default judgment. The Court ruled that the issue of the Plaintiffs' damages would be addressed at a later inquisition hearing. After failing in its effort to lift the default judgment, Fairbanks is now attempting to use the affirmative defense of *res judicata* to defeat Plaintiffs' damages claims.

In support of its argument, Fairbanks relies on a select portion of a Georgia Court of Appeals case: “[a] defendant in default is in the position of having admitted each and every material allegation of the plaintiff’s petition except as to the amount of damages alleged.”⁸ What Fairbanks fails to cite is the very next sentence in the decision, which states: “[t]he default concludes the defendant’s liability, *and estops him from offering any defenses which would defeat the right of recovery.*”⁹ What Fairbanks also fails to note is that this Georgia decision is distinguishable. In *Conseco*, the Georgia Court of Appeals reversed the trial court’s decision to award damages.¹⁰ Although the Court of Appeals acknowledged that the plaintiffs were entitled to recover their actual damages for a violation of the Georgia Fair Business

⁸Def. Reply Br., D.I. 94, at 4 (*quoting Conseco Finance Servicing Corporation v. Hill*, 556 S.E. 2d 468, 472 (Ga. App. 2001)).

⁹*Conseco Finance Servicing Corporation*, 556 S.E.2d at 472 (emphasis added) (*quoting Azarat Marketing Group v. Dept. of Admin. Affairs*, 537 S.E.2d 99 (Ga. App. 2000)).

¹⁰*Id.* at 470.

Practices Act, it determined that the plaintiffs failed to present sufficient evidence to establish those damages.¹¹ Thus, the issue in *Conseco* was not whether the defendant could assert an affirmative defense to the plaintiffs' claims for damages, *but whether the plaintiffs had sufficient evidence to support a claim for damages.*

The Court will not allow Fairbanks to assert the affirmative defense of *res judicata* as bar to damages, because it failed to properly and timely raise this defense. Fairbanks cannot use *res judicata* to circumvent the default judgment. As noted above, the Court has the discretion to vacate an order of default judgment if the movant can establish “four essential elements: 1) that his conduct was that of a reasonably prudent person; 2) that the motion was not brought after an unreasonable delay; 3) the presence of a meritorious defense; and 4) the lack of substantial prejudice to the non-moving party.”¹² Rule 60(b) specifically provides that

[T]he Court may relieve a party or a party's 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

¹¹*Id.* at 473.

¹²*Concors Supply Co.*, 1988 WL 130437, at *2 (citing *Cohen*, 238 A.2d 320; *Keith*, 451 A.2d 842; *Farmers Bank*, Del.Super., C.A. No. 79C-SE-105, Christie, J. (1982)).

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.¹³

Once default judgment has been ordered, the affirmative defense of *res judicata* is only appropriate as a basis for relief under Rule 60(b), not as the basis for a summary judgment motion that, if granted, would vitiate the default judgment order.

The Court denied Fairbanks' motion to vacate the default judgment based on Fairbanks' failure to demonstrate excusable neglect or mistake. Fairbanks raised the issue of *res judicata* in its first motion to vacate that default judgment, which it filed on October 18, 2004. However, for some reason, Fairbanks did not raise the *res judicata* issue in its second motion to vacate, which it filed on March 7, 2005, nor did Fairbanks raise the issue at oral argument on June 8, 2005. In any event, the fact that the Court denied Fairbanks' motion to vacate the default judgment on grounds other than the *res judicata* argument does not help Fairbanks. The existence of a meritorious defense alone does not guarantee that an order of default judgment will be lifted. In *Apartment Communities Corp. v. Martinelli*,¹⁴ the Delaware Supreme Court held that the trial court was not required to consider a defendant's meritorious defense as a basis for relief under Rule 60(b) if the defendant did not have a

¹³Rule 60(b).

¹⁴859 A.2d 67 (Del. 2004).

satisfactory explanation for its failure to answer the complaint.¹⁵ “It is well-established that the Superior Court should consider either ‘the possibility of a meritorious defense’ or possible prejudice to the plaintiff, *only if* a satisfactory explanation has been established for failing to answer the complaint, e.g. excusable neglect or inadvertence.”¹⁶ In this case, Fairbanks had the opportunity to raise the affirmative defense of *res judicata* in its motion to vacate default judgment, and did so.¹⁷ The Court’s decision denying Fairbanks’ motion on other grounds does not preserve Fairbanks’ right to revive the affirmative defense of *res judicata* as the basis for a summary judgment motion during the inquisition phase of the case.

CONCLUSION

For the aforementioned reasons, the motion for summary judgment of Defendant, Fairbanks Capital Corporation, is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

¹⁵*Id.* at 72.

¹⁶*Id.* (emphasis added) (*quoting Battaglia v. Wilmington Sav. Fund Soc’y*, 379 A.2d 1132, 1135 (Del. 1977); *Keith*, 451 A.2d at 846). *See also Phillips v. Siano*, 1999 WL 1225245, at *4 (Del. Super.) (declining to consider the defendant’s meritorious defense as a basis for relief under Rule 60(b), because it determined that the defendant’s delay in seeking relief was unreasonable).

¹⁷Def. Mot. to Vacate Default Judgment, D.I. 5.