COURT OF CHANCERY OF THE STATE OF DELAWARE

KIM E. AYVAZIAN MASTER IN CHANCERY CHANCERY COURTHOUSE
34 The Circle
GEORGETOWN, DELAWARE 19947
AND
NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DELAWARE 19980-3734

November 13, 2013

Elizabeth M. Sutor-Banks Dean A. Banks 329 4<sup>th</sup> Avenue Wilmington, DE 19809 David J. Ferry, Jr. Esq. Ferry, Joseph & Pearce, P.A. 824 Market Street, Suite 1000 P.O. Box 1351 Wilmington, DE 19899

RE: Ella Moffett v. Elizabeth M. Sutor and Dean Banks, C.A. No. 6879-MA

Dear Parties:

Pending before me are two motions to vacate and an "ex parte motion for stay of execution" filed by Defendants Elizabeth M. Sutor-Banks and Dean A. Banks. For the reasons that follow, I recommend in this final report that the motions to vacate and for stay of execution be denied.

The first motion to vacate was filed during the pendency of Defendants' appeal to the Supreme Court of the April 15, 2013 Final Order of this Court ("April 15<sup>th</sup> Order"). <sup>1</sup> By way of background, on March 28, 2013, I issued a draft report following a hearing on Plaintiff's exceptions to Defendants' accounting of their use of \$7,170.02, which funds Defendant Sutor-Banks had withdrawn from Plaintiff's account at WSFS Bank, and had used to pay Defendants' own expenses rather than for the benefit of Plaintiff. In my

<sup>&</sup>lt;sup>1</sup> Elizabeth M. Sutor-Banks and Dean A. Banks, D.D. v. Ella Moffett, Del. Supr., No. 242, 2013. Docket Item No. 1.

March 28<sup>th</sup> written draft report, I sustained Plaintiff's exceptions to the accounting, and recommended that Defendants pay \$7,170.02 to Plaintiff, that a judgment should be entered against Defendants, jointly and severally, for \$7170.02, and that the judgment should be transferred to and recorded in the Prothonotary of the Superior Court. No exceptions were taken to my draft report which, in the absence of any exceptions being filed by any party, was then deemed final under Court of Chancery Rule 144(a)(2).<sup>2</sup> The final report was submitted to the Chancellor, who approved it and adopted the factual findings therein in a Final Order of this Court dated April 15, 2013. It was from this April 15<sup>th</sup> Order that Defendants filed their notice of appeal.

Before the Supreme Court issued its Order dated August 22, 2013, affirming the judgment of this Court, Defendants filed a motion in this Court to vacate my final report dated April 11, 2013. This was the same report that I had issued as a draft report on March 28, 2013, but that was deemed a final report on April 11<sup>th</sup> under Rule 144(a)(2) because of Defendants' failure to file any exceptions thereto. Plaintiff correctly responded that I had no jurisdiction to entertain this motion while the appeal to the Supreme Court was pending. *See Campbell v. State*, 2011 WL 2739462 (Del. July 11,

<sup>&</sup>lt;sup>2</sup> Court of Chancery Rule 144(a)(2) provides:

Reports without exception by any party. In any case where no party takes exception, within the time periods allowed above, to the draft report or to the final report, the report shall be deemed final, and the parties shall be deemed to have stipulated to the approval and entry of the report as a final order of this Court. The Master shall submit the report to the presiding Chancellor or Vice Chancellor for review and for entry of the report as an order of the Court, as appropriate. The Court will review the legal and factual findings in the final report *de novo*. If the Court does not indicate otherwise within one week of the date upon which the period for taking exceptions expired, the Report shall be deemed adopted in its entirety as an Order of the Court by stipulation of the parties, and shall

2011) (holding that the Superior Court could not vacate an existing order because "it lacked jurisdiction to do so because Campbell had timely filed this appeal on February 16, 2011."). Therefore, that motion should have been dismissed without prejudice.

On July 3, 2013, Defendants filed in this Court a copy of a document entitled "ex parte motion for stay of execution," which had been filed in the Supreme Court and denied by that Court under Supreme Court Rule 32(a) on June 13, 2013.<sup>3</sup> *See Sutor-Banks et al. v. Moffett*, Del. Supr., C.A. No. 242, 2013, Jacobs, J. (June 13, 2013) (ORDER). According to this motion, the Sheriff's notice of Inventory and Appraisement of the Goods and Chattels in C.A. N13J-01521 had been posted on their property on June 12, 2013, but Defendants claimed that title to these items had already been transferred to another individual as collateral for a loan to pay their expenses.

After affirming the judgment of this Court, the Supreme Court issued its mandate on September 9, 2013, thereby closing the case. Thereafter, on October 17, 2013, Defendants filed re-filed their motion to vacate my April 11<sup>th</sup> final report, and filed an "Ex Parte Motion for Stay of Execution of Chancery Court Order." Neither of these two motions has any merit.

have the same effect as though ordered by a Chancellor or Vice Chancellor, as of the date it was issued by the Master, *nunc pro tunc*.

<sup>&</sup>lt;sup>3</sup> Supreme Court Rule 32(a) provides:

A motion for stay must be filed in the trial court in the first instance. The trial court retains jurisdiction over the initial motion and must rule on the initial motion regardless of whether the case is on appeal to this Court. A stay or an injunction pending appeal may be granted or denied in the discretion of the trial court, whose decision shall be reviewable by this court. The trial court or this Court, as a condition of granting or continuing a stay or an injunction pending appeal, may impose such terms and conditions, in addition to the requirement of indemnity, as may appear appropriate in the circumstances.

In their second motion to vacate, Defendants argue that they did not have a full understanding of this Court's procedures and were never informed that they had to file a formal written exception to my draft report. They also claim that they had no way to pay for a transcript since this Court had denied their applications to proceed *in forma* pauperis. Defendants contend that under Chancery Court Rule 60(b), their failure to file written exceptions constitutes a mistake and not ignorance of the law, and that my final report should be vacated.

The limited grounds for granting relief from judgment in Rule 60(b) implicate two significant values: (i) "the integrity of the judicial process," and (ii) the "finality of judgments." Wolf v. Triangle Board. Co., 2005 WL 1713071, at \*1 (Del. Ch. July 18, 2005 (quoting MCA, Inc. v. Matsushita Elec. Indus. Co., 785 A.2d 625, 634-45 (Del. 2001)). When a default judgment results from a defendant's failure to respond, Delaware courts will err on the side of granting relief to promote the policy of deciding litigation on the merits. See, e.g., Battaglia v. Wilmington Sav. Fund Soc., 379 A.2d 1132, 1135 (Del. 1977). When a judgment has been entered for other reasons, as here, a Rule 60(b) motion should not be easily granted. See Wolf, 2005 WL 1713071, at \*1.

Cancan Development, LLC v. Manno, 2011 WL 4379064 (Del. Ch. Sept. 21, 2011). In this case, there was a hearing on Plaintiff's exceptions to Defendants' accounting on February 19, 2013, and on March 28, 2013, I issued my written draft report recommending that Defendants should be held liable for the funds withdrawn from Plaintiff's account. Defendants have presented no evidence of mistake, only of their own ignorance of the Court's rules. Their belief that they had taken oral exceptions during the February 19<sup>th</sup> hearing, and their unsupported claims that they were under "extreme duress" and "were operating in an unfamiliar venue that challenged [their] cognitive reasoning" do not constitute reasonable justification for their failure to file timely written

exceptions. *See, e.g., Waters v. Waters*, 2011 WL 340401 (Del. Supr. Feb. 17, 2011). Defendants filed a timely appeal from the April 15<sup>th</sup> Order of this Court, which the Supreme Court denied as procedurally barred. It appears that Defendants are using their current motion to vacate as an attempt to obtain a new hearing and to have Plaintiff's counsel removed on the grounds of alleged misconduct; however, that is not the purpose of a motion under Rule 60(b). *See Dixon v. Delaware Olds, Inc.*, 405 A.2d 117, 119 (Del. 1979). Therefore, I recommend that Defendants' motion to vacate be denied.

Defendants' motion for a stay of execution of the Sheriff's sale was filed in this Court on October 17<sup>th</sup>, approximately one week before the sale was to take place. This Court does not have jurisdiction to issue a stay of execution of a judgment that is pending in another court. The judgment of this Court in this matter was transferred to the Superior Court on April 30, 2013, which issued a writ of *venditioni exponas* on September 4, 2013.<sup>4</sup> The record also reveals that Defendant Sutor-Banks filed *pro se* motions to vacate and to stay execution of the Chancery Court order in Superior Court on October 25, 2013.<sup>5</sup> Accordingly, the motion for a stay of execution should be denied.

Sincerely,

/s/ Kim E. Ayvazian

Kim E. Ayvazian Master in Chancery

<sup>&</sup>lt;sup>4</sup> Moffett v. Sutor-Banks et al., C.A. No. N13J-01521. Docket Item No. 6.

<sup>&</sup>lt;sup>5</sup> Id. at Docket Item Nos. 9 & 10.