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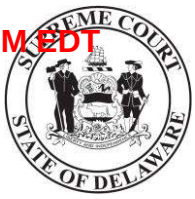

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANCH BANKING AND TRUST COMPANY, a bank organized under the laws of the state of North Carolina; Assignee of Mortgage Electronic Registration Systems, Inc., as nominee, a corporation organized and existing under the laws of the State of Delaware, Plaintiff Below, Appellant, v. HATEM G. EID A/K/A HATEM EID; YVETTE EID, Defendants Below, Appellees.	Case No. 385, 2014 On Appeal from the Superior Court in and for New Castle County C.A. No. N11L-12-270-CEB

APPELLANT'S THIRD CORRECTED OPENING BRIEF

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NATURE OF PROCEEDING

This case arises out of a residential foreclosure action *scire facias sur mortgage* and a suit on a note filed by Plaintiff-Appellant Branch Banking and Trust Company ("BB&T"), the holder of the note signed by Defendant-Appellee Hatem Eid and assignee of the mortgage signed by Mr. Eid and Defendant-Appellee Yvette Eid. The Eids admitted below that they have failed to make a single payment on the note and mortgage for nearly five years, and offered no defense or explanation for that failure. In the words of the trial judge, "you're supposed to pay your mortgage . . . even in Delaware." (A169.)[1] BB&T filed a Motion for Summary Judgment, and the Superior Court, Hon. Charles E. Butler presiding, issued a memorandum opinion granting that motion on both BB&T's foreclosure and breach of contract claims.

The Eids filed an appeal from that order before the trial court entered a final judgment that included a damages award. After this Court issued a notice to show cause why the appeal was not interlocutory, the parties stipulated to dismissal of the appeal. The trial court subsequently entered a final judgment order awarding damages to BB&T.

The Eids missed the deadline to appeal from the final judgment order. Instead, nearly two months after the judgment was entered, they filed a motion to

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[1] Citations to "A___." refer to Appellant's Appendix.

vacate the judgment under Rule 60(b) (the "Motion to Vacate"), contending that their counsel never received notice of entry of the judgment. BB&T opposed the Motion to Vacate on three grounds: (i) Superior Court Rule 77(d) prevented the trial court from granting the requested relief, (ii) the Eids failed to show excusable neglect under Superior Court Rule 60(b)(1), and (iii) extraordinary circumstances did not exist to justify vacating the judgment under Superior Court Rule 60(b)(6).

The trial court granted the Motion to Vacate in open court, apparently applying an "interest of justice" standard, and entered a written order finding that "good cause" existed to grant the motion. The trial court subsequently re-entered a final judgment order in favor of BB&T, and BB&T filed a timely notice of appeal from the order granting the Motion to Vacate.

BB&T's appeal from the trial court's grant of the motion to vacate presents three issues for the Court's review:

(1) Does Superior Court Rule 77(d) preclude the trial court from granting a motion to vacate based on counsel's purported failure to receive notice of entry of a final judgment? (A233-36.)

(2) Did the trial court err in applying an undefined "interest of justice" standard to the Rule 60(b) Motion? (A233-36.)

(3) Did the trial court abuse its discretion in granting the Rule 60(b) motion where the Eids failed to establish an entitlement to relief under either Superior Court Rule 60(b)(1) or 60(b)(6)? (A233-36.)

SUMMARY OF ARGUMENT

1. Superior Court Rule 77(d) states that "[l]ack of notice of the entry [of a final judgment] by the Prothonotary does not affect the time to appeal or relieve or authorize the Court to relieve a party for failure to appeal within the time allowed." (bracketed text inserted). Under the plain language of the rule and this Court's holding in *Giordano v. Marta*, 723 A.2d 833 (Del. 1998), the trial court lacked authority to vacate the March 20 Judgment.

2. The trial court erred as a matter of law in deciding the Motion to Vacate under a vague and undefined "interest of justice" standard. The standard for review for a motion under Superior Court Rule 60(b)(1) is whether the movant has shown (1) excusable neglect, (2) the existence of a meritorious defense and (3) that the plaintiff would not suffer substantial prejudice from granting the motion. *Christiana Mall, LLC* v. *Emory Hill & Co.*, 90 A.3d 1087, 1091 (Del. 2014). The standard of review for a motion under Superior Court Rule 60(b)(6) is whether extraordinary circumstances exist to grant the motion. *Jewell v. Div. of Soc. Servs.*, 401 A.2d 88, 90 (Del. 1979). The trial court did not apply either of these standards and did not make any findings of fact or conclusions of law from which the Court can evaluate its decision.

3. The trial court abused its discretion in granting the Motion to Vacate because the Eids failed to establish an entitlement to relief under Superior

Court Rule 60(b)(1) . The Eids have not shown excusable neglect, as they offered no explanation of why counsel received notice of some orders but not others, and offered no evidence of counsel's diligence in monitoring the docket. The Eids also cannot establish the existence of a meritorious defense, as the trial court already ruled on the merits.

4. The trial court abused its discretion in granting the Motion to Vacate because the Eids failed to establish an entitlement to relief under Superior Court Rule 60(b)(6). The mere fact that the Eids could not obtain appellate review does not constitute "extraordinary circumstances" under the rule. This Court will not excuse an untimely appeal "in the absence of unusual circumstances which are not attributable to the appellant or the appellant's attorney," *Riggs v. Riggs*, 539 A.2d 163, 164 (Del. 1988), and the Eids fail to establish the existence of any such extraordinary or unusual circumstances.

STATEMENT OF FACTS

A. The Parties

Defendants-Appellants Hatem G. Eid and Yvette Eid reside in Tampa, Florida. (A010; A053.) BB&T is a bank organized under the laws of the State of North Carolina with its corporate headquarters in Winston-Salem, North Carolina. (A009.)

B. Mr. Eid Executes the Loan Documents

On or about February 29, 2008, Mr. Eid executed a promissory note (the "Note") in favor of U.S. Mortgage Finance Corporation ("U.S. Mortgage"). (A010; A053; A115-17.) On the same day, Mr. and Ms. Eid executed a Mortgage that secures the Note with the property located at 16 Dempsey Drive, Newark, Delaware 19713 (the "Property"). (A010; A053; A119-37.)

C. The Transfers of the Note

The Note that Mr. Eid admittedly signed states that "I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" (A115.). Mr. Eid also signed a Notice of Assignment, Sale or Transfer of Servicing Rights in which he acknowledged that the servicing rights to the Mortgage were being transferred to BB&T. (A139.) A second, similar notice was mailed to Mr. Eid at his Tampa address. (A141.)

U.S. Mortgage, the original lender, transferred its servicing rights to BB&T effective April 1, 2008. (A139; A141.) The Note was physically transferred to BB&T by Southwest Securities, FSB ("SWS"), which held the Note as custodian and bailee on behalf of U.S. Mortgage pursuant to a Special Power of Attorney. (A111 at ¶11.) SWS, as U.S. Mortgage's attorney-in-fact, endorsed the Note to "Branch Banking and Trust Company Without Recourse." (A117.) BB&T subsequently endorsed the Note in blank. (*Id.*)

On or about April 14, 2008, BB&T transferred its interest in the Note to the Federal Home Loan Mortgage Corporation ("Freddie Mac"). (A111 at ¶12.) Pursuant to a contractual agreement with Freddie Mac, following the transfer, BB&T remained the servicer of the Mortgage and held the Note as custodian for Freddie Mac. (*Id.*) On or about July 7, 2011, Freddie Mac transferred its interest in the Note back to BB&T. (*Id.* at ¶13.)

D. The Assignment of the Mortgage From MERS to BB&T

The mortgage that the Eids admit signing identifies MERS as the mortgagee. (A010; A053; A119.) Specifically, the Mortgage states that "Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS" the mortgaged property. (A121.) The mortgage also included the following covenant:

> The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note Purchaser.

(A131.)

Shortly after execution, the mortgage was recorded in MERS' name in the real property records for New Castle County, Delaware, at 20080314-0017357. (A143.) MERS subsequently assigned the Mortgage to BB&T, which was already servicing the mortgage per its agreement with Freddie Mac. (*Id.*) The assignment of the Mortgage from MERS to BB&T was duly recorded in the real property records for New Castle County, Delaware, at Instrument No: 20090707-0044169. (*Id.*)

As a result of the assignment of the Mortgage and the transfer of the Note, BB&T became both the mortgagee under the Mortgage and the owner and holder of the Note. BB&T remained as such at the time of filing the lawsuit.

E. The Eids Default on the Loan

The Eids do not dispute that they have failed to make any payments on the loan since December 1, 2008. (A014 at ¶33-35; A055 at ¶33-35.)

F. BB&T Files Suit and Seeks Summary Judgment

BB&T filed its Complaint in this action on December 29, 2011 and the Eids answered on February 14, 2012. (A009-17; A051-62.) On October 2, 2012, BB&T served discovery on the Eids, and Requests for Admissions. (A068-108.) The Eids failed to answer the Requests for Admissions and failed to serve timely discovery responses. BB&T filed its Motion for Summary Judgment on February 1, 2013. (A063-149.) In support of its motion, BB&T submitted an affidavit from Rick Miller, Assistant Vice President in the Non-Performing Loans Division, that authenticated the loan documents and detailed the loan history. (A109-43.)

The Eids filed their opposition to summary judgment on Feb. 25, 2013. (A150-59.) Their submission included an affidavit from Mr. Eid in which he admitted that he received but did not respond to the Requests for Admission, and stated his intent to serve responses. (A156.) Mr. Eid's affidavit did not dispute his failure to make payments on the Note or otherwise challenge the authenticity of any documents or evidence submitted by BB&T. (A155-56.) Defendants offered

no evidence other than Mr. Eid's affidavit, and did not seek leave to take any discovery on those topics.

G. The Court Grants Summary Judgment for BB&T on the Issue of Liability.

Judge Butler held a hearing on BB&T's summary judgment motion on March 7, 2013. (A160-70.) Mr. Eid's counsel admitted at that hearing he had no evidence to dispute the validity of BB&T's status as mortgagee and owner and holder of the note:

> THE COURT: ... Do you have any evidence to show that it wasn't assigned to MERS or that MERS didn't assign it back out or that BB&T is not suing? I mean, all those things are true aren't they? Or are they? I mean, do you have evidence?
>
> MR. ROBINSON: No. ***We haven't done any discovery and I don't have any evidence to the contrary as I stand here today,*** Your Honor. We haven't had an opportunity to. We were retained about a month ago and we have not had an opportunity to discover.
>
> THE COURT: And you have not moved the Court for leave to take discovery to refute the allegations in the summary judgment motion under Rule 56(f)?
>
> MR. ROBINSON: ***No, we have not, at this time Your Honor. We have not.*** We wanted to –

(A166 at 26-27) (emphasis added).

At the conclusion of the hearing, Judge Butler offered the Eids the opportunity to submit a supplemental brief on the legal issues discussed at the hearing and to request to take discovery directed to its standing argument: "I think

he may have some discrete questions that he has to get answered in order to leverage his argument, and if he presents them, I may grant the motion for relief to take some discovery." (A169 at 40.) The Eids did not file a motion under Rule 56(f) and chose not to request discovery in their supplemental brief. (A171-77.)

Judge Butler issued his opinion granting summary judgment for BB&T on June 13, 2013. The summary judgment opinion established the Eids' liability on the note and BB&T's right to foreclose under the mortgage, but left open the issue of BB&T's damages on its breach of contract claim. (A206-15.)

H. The Eids Take an Interlocutory Appeal From the Summary Judgment Opinion.

The Eids filed an Amended Notice of Appeal from the summary judgment opinion on July 11, 2013 (the "First Appeal"). (A217-18.) On October 3, 2013, this Court issued a Notice to Show Cause as to why the First Appeal was not an improper interlocutory appeal. (A220.) On October 24, 2013, the Eids filed a stipulation and order dismissing the First Appeal without prejudice. (A221-22.) The Superior Court subsequently entered an Order on March 20, 2014 (the "March 20 Judgment") awarding BB&T damages of $263,210.86. (A223-24.)

I. After the Eids Miss the Deadline to Appeal From the Final Judgment, the Trial Court Vacates That Judgment and Enters a New Final Judgment.

The Eids failed to appeal the March 20 Judgment. Instead, on May 30, 2014, the Eids filed a Motion to Vacate the Judgment and Reopen the Case

Pursuant to Superior Court Rule 60(b) (the "Motion to Vacate"). (A225-29.) [2] In the Motion to Vacate, the Eids contended that their attorneys failed to receive notice of entry of the March 20 Judgment. (A226-27.) The Eids acknowledged that the attorney who originally argued the summary judgment motion, Colin Robinson, left the Bayard firm (which continued to represent the Eids) in April 2013, but remained the only counsel of record on the Lexis-Nexis File & Serve System for over a year. (*Id.*) The Eids requested that the Superior Court vacate the judgment so that it could be re-entered and the Eids could file a timely notice of appeal. (*Id.*) BB&T opposed the Motion to Vacate on the grounds that Superior Court Rule 77(d) precluded the trial court from granting the requested relief and that relief was not warranted under Rule 60(b). (A233-41.)

The Superior Court heard the Motion to Vacate on June 18, 2014 and entered an order granting the motion on June 19, 2014 (the "Rule 60(b) Order"). (A249.) On July 21, 2014, the Superior Court entered a Final Judgment Order in favor of BB&T (the "July 21 Judgment"). (A250-51.) BB&T filed a timely notice of appeal from the Rule 60(b) Order on July 21, 2014, and the Eids filed a notice of cross-appeal as to the July 21 Judgment on July 29, 2014.

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[2] Exhibit A to the Motion to Vacate consists of the Eids' opening brief in the First Appeal, as well as a copy of the Eids' Appendix in the First Appeal. In order to minimize the amount of duplicative information filed with the Court, BB&T has not included that exhibit as part of its Appendix.

ARGUMENT

I. SUPERIOR COURT RULE 77(d) PRECLUDES GRANTING THE EIDS' MOTION TO VACATE THE MARCH 20 JUDGMENT.

A. Question Presented

Does Superior Court Rule 77(d) preclude the trial court from granting a motion to vacate based on counsel's purported failure to receive notice of entry of a final judgment? (A233-36.)

B. Scope of Review

"[T]he grant or denial of a Rule 60(b) motion is generally reviewed for an abuse of discretion. A claim that the trial court employed an incorrect legal standard, however, raises a question of law that this Court reviews *de novo*." *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 638 (Del. 2001). *See also Jackson v. State*, 654 A.2d 829, 832 (Del. 1995) ("as a Court of last resort, this Court's interpretation of the applicability of rules of court, as well as statutes, must control.")

C. Merits of the Argument

1. Rule 77(d) Precludes This Court From Granting the Relief Sought By Defendants.

Defendants contended below that they did not receive notice of the Court's March 20, 2014 Order. Under Superior Court Rule 77(d), however "*[l]ack of notice of the entry* [of a final judgment] by the Prothonotary *does not affect the time to appeal or relieve or authorize the Court to relieve a party for failure to*

appeal within the time allowed." (bracketed text inserted; emphasis added). The plain language of the rule is clear—the Eids' lack of notice of the entry of the March 20 Judgment does not authorize the trial court to grant relief for the Eids' failure to file a timely notice of appeal.

The Court's discussion of Rule 77(d) in *Giordano v. Marta*, 723 A.2d 833, 837 (Del. 1998) confirms this plain-language reading of the rule. The Court in *Giordano* contrasted Superior Court Rule 77(d) with its counterparts in the Federal Rules of Civil and Appellate Procedure, which were amended in 1991 to permit a federal district court to provide relief from a final judgment where a party does not receive actual notice of the judgment. *See* Fed. R. App. P. 4(a)(6); Fed. R. Civ. P. 77(d). As the Court noted in *Giordano*, "[w]hen the Federal Rules contained similar language [to Rule 77(d)] several years ago, the clerk's failure to mail a notice of judgment to the attorney for a party *did not constitute excusable neglect for filing an untimely appeal.*" 723 A.2d at 837 (bracketed text inserted; emphasis added) (citing *Bortugno v. Metro-North Commuter Railroad*, 905 F.2d 674, 676 (2d Cir.1990)). The Court further observed that absent revisions to Delaware's rules, "relief is not available because the appellant's attorney failed to file a timely notice of appeal with this Court." *Id.*

The Court has recognized a limited exception to this rule where court personnel are responsible for a party's failure to file a timely notice of appeal. *See*

Plummer v. R.T. Vanderbilt Co., Inc., 49 A.3d 1163, 1166 (Del. 2012) ("Unless the appellant can demonstrate that failure to file a timely appeal is attributable to court-related personnel, this Court lacks jurisdiction to consider the matter."); *Faulkner v. M. Davis & Son, Inc.*, 991 A.2d 18, 2010 WL 376970, at *1 (Del. 2010) (Table Op.) ("Even assuming that appellant did not receive a copy of the Superior Court's decision until August 18, his counsel's alleged failure to file the notice of appeal on his behalf in a timely manner does not, as appellant suggests, mean that the untimely filing is attributable to Superior Court personnel."). The Eids did not argue that this exception applies, however, nor does the record contain any evidence to support such an argument.

Because the trial court lacked the authority to vacate the March 20 Judgment, the Court should reverse the Rule 60(b) Order, reinstate the March 20 Judgment, and dismiss the Eids' cross-appeal as untimely.

II. THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD TO THE RULE 60(b) MOTION.

A. Question Presented

Did the trial court err in applying an undefined "interest of justice" standard to the Rule 60(b) Motion? (A233-36.)

B. Scope of Review

As noted above "the grant or denial of a Rule 60(b) motion is generally reviewed for an abuse of discretion. A claim that the trial court employed an incorrect legal standard, however, raises a question of law that this Court reviews *de novo*." *MCA*, 785 A.2d at 638 (Del. 2001).

C. Argument

1. The Trial Court Applied an Incorrect Standard of Review to the Motion to Vacate.

In this case, the Eids specifically sought relief under Superior Court Rule 60(b)(1) and 60(b)(6). (A227-28.) Rule 60(b)(1) provides that a judgment may be vacated on the basis of "[m]istake, inadvertence, surprise, or excusable neglect." To prevail on a Rule 60(b)(1) motion; the movant must show (1) excusable neglect, (2) the existence of a meritorious defense and (3) that the plaintiff would not suffer substantial prejudice from granting the motion. *Christiana Mall, LLC* v. *Emory Hill & Co.*, 90 A.3d 1087, 1091 (Del. 2014). Rule 60(b)(6) provides "an independent ground for relief, with a different standard to be

applied than under [Rule 60's] other subdivisions, in particular (1) and (3)." *Jewell v. Div. of Soc. Servs.*, 401 A.2d 88, 90 (Del. 1979). In order to prevail under a Rule 60(b)(6) motion, a movant must establish the existence of "extraordinary circumstances" that would justify the relief. *Id.*

Neither the trial court's comments at the hearing on the motion nor its written order make any reference to the "excusable neglect" standard or the "extraordinary relief" standard. Rather, at the hearing on the motion, the court put the following question to counsel for BB&T: "I have the right under the interest of justice provisions to make this thing right, right?" (A246.) The trial court did not explain—either in open court or in its written order—what it meant by the "interest of justice provisions" or why the Eids would or should prevail under that standard.

In determining whether the trial court abused its discretion, the Court "must determine whether the findings and conclusions of the Superior Court are supported by the record and are the product of an orderly and logical deductive process." *Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 37 (Del. 1991). The trial court's application of an incorrect legal standard and the absence of any findings of fact or conclusions of law make it impossible for this Court to conduct that analysis, and necessarily constitutes an abuse of discretion. Moreover, as explained in the next section, the Eids were not entitled to relief under the correct legal standards.

III. THE EIDS FAILED TO MEET ANY OF THE CRITERIA FOR GRANTING A MOTION UNDER RULE 60(b)(1) OR (60(b)(6).

A. Question Presented

Did the trial court abuse its discretion in granting the Rule 60(b) motion where the Eids failed to establish an entitlement to relief under either Rule 60(b)(1) or Rule 60(b)(6)? (A233-36.)

B. Scope of Review

As noted above "the grant or denial of a Rule 60(b) motion is generally reviewed for an abuse of discretion." *MCA*, 785 A.2d at 638 (Del. 2001).

C. Argument

1. The Eids Failed to Meet the Standard to Vacate a Judgment Under Rule 60(b)(1).

To prevail on a motion under Rule 60(b)(1), the movant must show "(1) excusable neglect in the conduct that allowed the default judgment to be taken; (2) a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on its merits; and (3) that substantial prejudice will not be suffered by the plaintiff if the motion is granted." *Christiana Mall*, 90 A.3d at 1091 (internal bracketing and citations omitted). "The defendant must first establish excusable neglect before the Superior Court will consider whether a meritorious defense or prejudice to the plaintiff exists." *Id.*

a. The Eids Did Not Establish Excusable Neglect.

Although the Eids maintain that counsel never received notice of entry of the March 20 Judgment, they never explained counsel's failure to update the service information on the Lexis Nexis File & Serve system. Paragraph 11 of Superior Court Administrative Directive 2007-6 requires counsel to "notify LexisNexis within 10-days of any change in firm name, delivery address, fax number or e-mail address." The Eids also do not explain how they apparently received notice of prior court orders after Mr. Robinson left the Bayard firm. For example, the Eids assert that Mr. Robinson left the Bayard firm on April 12, 2013—two months prior to the Court's June 13, 2013 Memorandum Opinion. (A225.) Despite Mr. Robinson's departure, the Eids nonetheless filed a timely (albeit interlocutory) appeal from that decision.

The Eids also do not dispute that the proposed order on the March 20 Judgment was served by mail on defense counsel—they claim only that counsel did not receive it. The File & Serve Xpress filing receipt, however, establishes that Plaintiff served the proposed order by first-class mail to Mr. Robinson at the Bayard firm, who the Eids admit was the only counsel of record listed on the File & Serve Xpress docket. (A226, ¶5; A238.) Under Superior Court Rule 5(b), service of the proposed order to the Bayard firm was complete upon mailing, and BB&T did not need to prove actual receipt by the Eids or their attorneys. *See Sharp v. State Farm Mut. Auto. Ins.*, CIV.A. 05C-02-037WLW, 2006 WL 337043

(Del. Super. Jan. 24, 2006) (finding proper service where document was mailed to law firm, even though the attorney served had previously withdrawn as counsel and was replaced by another attorney at the same firm).

Finally, although counsel has not located a Delaware case squarely addressing the issue, the Third Circuit, in a case decided prior to the 1991 amendments to the federal rules, held that a party must show its own diligence in monitoring the status of the case in order to obtain relief under Rule 60(b). *See Hall v. Cmty. Mental Health Ctr. of Beaver Cnty.*, 772 F.2d 42, 44 (3d Cir. 1985) (observing that courts considering Rule 60(b) motions "have usually held that 'the simple failure of the clerk to mail notice of the entry of judgment, without more, does not permit relief to a party who has failed to appeal within the prescribed time.'") (quoting *Wilson v. Atwood Group*, 725 F.2d 255, 257 (5th Cir. 1984)); *see also Mizell v. Attorney Gen. of State of N.Y.*, 586 F.2d 942, 945 n.2 (2d Cir. 1978) ("a Rule 60(b)(6) motion may not be granted absent some showing of diligent effort by counsel to ascertain the status of the case.") Again, the Eids failed to offer any explanation or excuse for counsel's failure to monitor the docket in this case.

b. The Eids Did Not Establish a Meritorious Defense That Would Change the Outcome of the Litigation.

Because the trial court already decided this case on its merits, the "meritorious defense" criteria is of little relevance. *See Rice v. Consol. Rail Corp.*, No. 94-3963, 1995 WL 570911, at *6 (6th Cir. Sep. 27, 1995) (stating that the Rule

60(b)(1) factors "are relied on by courts faced with default judgments, not in cases where relief is requested from a grant of summary judgment, a decision based on the merits of an action"). That is especially true here, where the Eids not only opposed summary judgment, but also had the opportunity to present supplemental briefing on summary judgment.

Even if the "meritorious defense" criteria were relevant, vacating the judgment would not have lead to a different outcome in the trial court—indeed, the Eids stipulated that they would not oppose entry of the order granting summary judgment. (A228, ¶11.) The Eids made perfectly clear that the entire purpose of the Motion to Vacate was to enable them to circumvent the deadlines for filing a notice of appeal. (*Id.*) That is not the proper purpose of a Rule 60(b) motion. *Cf. Dixon v. Delaware Olds, Inc.*, 405 A.2d 117, 119 (Del. 1979) ("To allow relief under Rule 60(b) in these circumstances would encourage parties to disregard the procedures and time limits provided for elsewhere in the Superior Court Rules.")

2. *The Eids Failed to Establish the Existence of "Extraordinary Circumstances" To Justify Vacating the Judgment Under Rule 60(b)(6).*

Finally, the Eids failed to establish "extraordinary circumstances" under Rule 60(b)(6). "The 'extraordinary circumstances' test is a demanding standard that generally requires a showing that, in the absence of relief from the order, the movant will suffer 'extreme hardship.'" *High River Ltd. P'ship v. Forest*

Labs., Inc., CIV.A. 7663-ML, 2013 WL 492555, at *9 (Del. Ch. Feb. 5, 2013). As noted above, this case falls squarely within Rule 77(d), and the Eids did not offer any explanation or justification for their failure to file a timely notice of appeal, other than their claim that counsel never received the notice of entry. This Court has repeatedly made clear, however, that it will not excuse an untimely appeal "in the absence of unusual circumstances which are not attributable to the appellant or the appellant's attorney." *Riggs v. Riggs*, 539 A.2d 163, 164 (Del. 1988); *see also Draper King Cole v. Malave*, 743 A.2d 672, 673 (Del. 1999) ("When a party fails to perfect an appeal within the period mandated by statute, a jurisdictional defect is created that may not be excused in the absence of unusual circumstances that are attributable to court personnel and are not attributable to the appellant or the appellant's attorney.")

At bottom, the Eids' situation is no different than any other case in which a party fails to file a timely notice of appeal. That simply does not rise to the level of "extraordinary circumstances" sufficient to justify vacating the judgment and reopening this matter for further proceedings. Although the outcome may seem harsh, "all statutes of limitation and all statutory appeal requirements are, by their very nature, 'harsh' in that they arbitrarily establish jurisdictional prerequisites for initiating or maintaining a suit." *Mary A. O. v. John J. O.*, 471 A.2d 993, 995 (Del. 1983). If the Court were to uphold the Rule 60(b) Order, it would invite litigants to

file such motions as a matter of course and upset its well-established procedures for properly noticing and taking an appeal.

CONCLUSION

Based on the foregoing, BB&T respectfully requests that the Court reverse the trial court's grant of the Motion to Vacate, reinstate the March 20, 2014 Judgment, and dismiss Appellees' cross-appeal as untimely.

Respectfully submitted,

/s/ Robert T. Aulgur

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So Ordered
/s/ Butler, Charles E Jun 19, 2014

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Case No. N11L-12-270 CEB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BRANCH BANKING AND TRUST COMPANY, a bank organized under the laws of the State of North Carolina existing under the laws of the State of North Carolina; Assignee of Mortgage Electronic Registration Systems, Inc. as nominee, a corporation organized and existing under the laws of the State of Delaware,	PARCEL NO. 09-022.20-012
	C.A. NO. N11L-12-270 CEB
	NON-ARBITRATION CASE
	SCIRE FACIAS SUR MORTGAGE
Plaintiff,	Mortgage Record 20080314-00117357
HATEM G. EID A/K/A HATEM EID; YVETTE EID,	IN REM; IN PERSONAM
Defendants.	Assignment Record 20090707-0044169

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO VACATE THE JUDGMENT AND REOPEN THE CASE PURSUANT TO SUPERIOR COURT CIVIL RULE 60(B)

Upon the Defendants' Motion to Vacate the Judgment and Reopen the Case Pursuant to Superior Court Civil Rule 60(b) and for good cause shown,

IT IS HEREBY ORDERED THAT:

1. The Defendants' Motion to Vacate the Judgment and Reopen the Case Pursuant to Superior Court Civil Rule 60(b) is GRANTED.
2. The March 20, 2014, Order shall be vacated and the case shall be reopened.

Dated: _____, 2014

The Honorable Charles E. Butler