



IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                        |    |               |
|------------------------|----|---------------|
| DEUTSCHE BANK NATIONAL | \$ |               |
| TRUST COMPANY, AS      | \$ |               |
| TRUSTEE FOR MORGAN     | \$ |               |
| STANLEY ABS CAPITAL I  | \$ |               |
| INC. TRUST 2005-HE2    | \$ |               |
|                        | \$ |               |
| Plaintiff-Below        | \$ |               |
| Appellant              | \$ |               |
| v.                     | \$ | No. 506, 2012 |
|                        | \$ |               |
| NANCY GOLDFEDER c/o    | \$ |               |
| EMIL MIKHAIL, Guardian | \$ |               |
|                        | \$ |               |
| Defendant-Below        | \$ |               |
| Appellee               | \$ |               |

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APPELLANT'S SUPPLEMENTAL MEMORANDUM

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Appeal from the Superior Court for New Castle County  
(Honorable Mary M. Johnston, Judge)  
Remanded for additional information and hearing held by  
Honorable Charles E. Butler

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2005-HE2, Appellant  
Filed December 5, 2013

**APPELLEE WAS GIVEN ADEQUATE NOTICE**

Both Judge Johnston and Judge Butler in separate hearings have determined that the Appellee was given notice of the sale in compliance with Superior Court Civil Rule 69(g). In response to the specific question was it "adequate notice," Judge Butler agreed that it was adequate notice. However, the Court below then enters into a colloquy regarding "actual notice." As actual notice is not required by the statute, nor part of the question presented to the Court below by this Court, and all parties agree there was statutorily compliant notice, Appellant will utilize its time addressing the remaining questions.

**THE DELAY IN SEEKING RELIEF CANNOT, ON THIS RECORD, BE FOUND TO BE DUE TO THE ALLEGED INCOMPETANCE OF THE APPELLEE**

The question of the competence of the Appellee in this matter, Nancy Goldfeder, did not become a central part of this case until the hearing on the Motion to Vacate Sale in the Court below. Despite the fact that the Motion was based on an alleged lack of notice, Judge Johnston, sua sponte, granted the Motion to vacate based upon her belief that the Appellee was incompetent. This belief was not founded upon any medical testimony whatsoever, but rather was based solely upon the statements made in court by the Appellee's attorney.

On remand, Judge Butler held an evidentiary hearing on the issue of competency. During that hearing, the only testimony

provided was that of the guardian, Dr. Mikhail, a General Practitioner, with no specialized training or expertise in either mental health disorders or HIV/AIDS. Despite the fact that Dr. Mikhail has been treating Ms. Goldfeder since late 2000-early 2001, he failed to bring any medical records generated by his office to the Court hearing. Instead, the only physical evidence proffered during the testimony of Dr. Mikhail regarding the medical care and treatment of Ms. Goldfeder were documents authored by individuals not appearing in court. In response to questions by both the Court and Appellant's counsel, Dr. Mikhail revealed that "friends" of Ms. Goldfeder had provided him with most, if not all, of the documents. All of these documents are hearsay evidence being offered to prove the truth of the matter which they assert. Despite numerous and repeated objections by the Appellant, the Court below admitted every exhibit offered by the Appellee and has relied upon these hearsay documents in opining to this Court that Appellee should be found incompetent. The Court even acknowledges the inadmissibility of this evidence stating on page 5 of its written opinion to this Court, "[T]he Court, thus, did not believe it was constrained by the Delaware Rules of Evidence and the strictures of the Best Evidence Rule." Appellant is not aware of any rule of law, statute or exception to the laws of our state that exempt a Judicial Officer from adhering to the

Rules of Evidence when conducting an evidentiary hearing. As such, the lower Court's finding is predicated on inadmissible evidence which lacks even a minutia of credibility based upon the record, and should be disregarded. To find the Appellee incompetent based on inadmissible hearsay would set the threshold so low as to open a floodgate of new possibilities.

Even if the Court were to accept the lower Court's conclusion that the Appellee is incompetent, that incompetency would have to be the reason for the delay in taking action to set aside the sheriff sale. The lower Court states that because only Ms. Goldfeder could take action to set aside the sale prior to July of 2012 when Dr. Mikhail was appointed guardian, and because Ms. Goldfeder did not have actual knowledge of the sale, "it must be concluded that the delay in seeing redress was indeed caused by Goldfeder's incompetence." In reality, Ms. Goldfeder **did** know of the sheriff sale in January 2012, when she accompanied Dr. Mikhail to the Department of Justice to file a complaint regarding the sale of her property. She previously filed a complaint, on her own and against Dr. Mikhail, in 2010 when the property was scheduled for sale the first time.

Additionally, Appellee and Dr. Mikhail contacted an attorney in January of 2012 regarding the sale of this property, who then contacted Appellant's counsel. However, Appellee took no action with the court during this six (6) month period

despite actual knowledge by both the Appellee and the doctor, who later had himself appointed guardian. Rule 60(b) was never intended to bring relief to a litigant who sits on their rights.

**THE DELAY WAS NOT EXCUSABLE IN LIGHT OF THE FACT THAT A MEDICAL PROFESSIONAL WAS HELPING HER AS THE MEDICAL PROFESSIONAL WAS EXTRINSICALLY INTERTWINED WITH THE APPELLEE**

In order for the Court to set aside a sheriff sale after confirmation, the Court must find excusable delay. While the assistance of a medical professional might, in some circumstances, tend to support the conclusion that delay is reasonable, the assistance of a medical profession in *this* case and under *these* circumstances does not support that conclusion.

Dr. Mikhail is far from a disinterested party. During the course of his testimony, Dr. Mikahil revealed that he paid \$2000 a month for the Appellee's medical bills for a period of approximately two (2) years; he paid her mortgage during 2006-2007 out of his personal checking account; and he had an allegedly incompetent woman execute a lease and moved her into his home for almost 4 years during 2007-2011. He also revealed that he stores his own personal property in Appellee's house, and he confirmed that the Appellee is again living in his house now. These are hardly the actions one expects from their doctor/general practitioner.

The lower court has accepted Dr. Mikhail's motives as "genuine" albeit "incredulous." Even if one were to assume that

the lower Court is correct and the doctor's motives were genuine, Dr. Mikhail has repeatedly and consistently been involved in the events surrounding Ms. Goldfeder, her mortgage and her home, such that he is no longer just a "doctor" to his patient. While a doctor does not have a 'duty' to act on behalf of his patient on personal matters, Dr. Mikhail *CHOSE* to do so, and as such created a duty of reasonable diligence and due care.

As mentioned above, Dr. Mikhail was not simply aware that Ms. Goldfeder owned this property; he actually *uses* her home to store his own personal property at the location. Additionally, he paid the mortgage on her home with his own personal checks for almost two (2) years. The lower Court opines that this Court should believe that when Dr. Mikhail wrote these checks to "Countrywide Home Loans, Inc.," his 'linguistic and legal unsophistication' prevented him from understanding the payments were for a mortgage. However, the same Court has asked that we recognize expertise and hold credible the medical testimony of Dr. Mikhail; a licensed doctor who has been practicing medicine in the United States of America, speaking the English language and dealing with complex medical issues for well over 15 years. Appellant finds it difficult to find a man who is so intelligent could not understand that "Countrywide Home Loans, Inc.," coupled with the account number he wrote on each check was for the purpose of paying the mortgage. Additionally, on at least

three (3) of the checks, Dr. Mikhail actually wrote the property address in the memo line indicating payment was for the property at 1610 N. Union Street. (See Plaintiff's Appendix to Opening Brief in the Superior Court, filed June 13, 2013, P-19, P-26 and P-30). It is simply unreasonable, in light of this information, to believe that Dr. Mikhail was unaware of the purpose of these payments.

It is because Dr. Mikhail was intrinsically involved in the financial affairs of the Appellee, because he personally took on the responsibility of paying the loan, and because he himself uses the subject property, that the duty to act without unreasonable delay cannot be excused merely because a medical professional was assisting. *This* medical professional has a personal interest in the outcome.

**APPELLANT HAS SUFFERED A TREMENDOUS PREJUDICE AND SHOULD NOT BE FURTHER PENALIZED FOR TAKING STEPS TO MITIGATE ITS LOSSES**

The prejudice to the bank in this situation is not relatively limited, and the Plaintiff should not be penalized for taking steps to mitigate the damages it suffers.

The Appellant in this matter has not been paid since 2008. The property was condemned in 2007. There is very little value that the Appellant can recover from this property. Appellant voluntarily stayed the first sheriff sale to allow the DOJ to investigate Dr. Mikhail and the claims made by Ms. Goldfeder.

Appellant voluntarily stayed the eviction proceeding to allow Darrell Baker, Esq. the opportunity to review the 100+ pages of settlement documents provided by the Appellant after the Appellee, incorrectly, claimed a loan was never even taken out on the property. (See DOJ complaint, Plaintiff's Appendix to Superior Court Brief filed June 13, 2013, A39-43). Appellant voluntarily agreed to the appointment of a Guardian for purposes of the Writ of possession so that the Appellee would be fairly represented. As a result of the Appellant's more than generous conduct and patience, the Appellant has now suffered an additional year of being unable to collect on a debt that has been in default for over six (6) years and incurred the additional litigation expenses. While Appellant recognizes legal fees are a part of doing business, the expenditure of legal fees and the loss of the ability to recover the property are still creating a very large prejudice to the Appellant and the Appellant should not be penalized for engaging in conduct designed to minimize its losses. To do so is to discourage all future settlements and negotiations, and is a slap in the face to the willing participant of alternative dispute resolution.

Respectfully Submitted,

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