COURT OF CHANCERY
OF THE
STATE OF DELAWARE

SELENA E MOLINA
MASTER IN CHANCERY

LEONARD L. WILLIAMS JUSTICE CENTER
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DE 19801-3734

Final Report: March 25, 2019
Draft Report: March 8, 2019
Date Submitted: February 7, 2019

Ahmose Amexem El, Trustee
Phoenix Management Trust
c/o 1000 N. West Street, Suite 1200
Wilmington, DE 19801

Herbert W. Mondros, Esquire
Margolis Edelstein
300 Delaware Avenue, Suite 800
Wilmington, DE 19801

Steven L. Caponi, Esquire
Matthew B. Goeller, Esquire
K&L Gates LLP
600 N. King Street, Suite 901
Wilmington, DE 19801

Re: *Phoenix Management Trust, et al. v. Win South Credit Union*
C.A. No. 2018-0192-SEM
Phoenix Management Trust, et al. v. Compass/BBVA
C.A. No. 2018-0194-SEM

Dear Counsel and Litigants:

This final report addresses two actions filed by a purported Delaware trust seeking to discharge debts owed to two Alabama corporations. After its motions for summary judgment and judgment by default were denied, the trust filed nearly identical motions to vacate denial of default judgment under Court of Chancery Rule 60(b)(1) in both actions. Shortly thereafter, both defendants filed motions to dismiss. For the following reasons, I recommend that the Court deny the motions to vacate and strike and grant the motions to dismiss. This is a final report.

I. Background

Plaintiff Phoenix Management Trust ("Phoenix") purports to be a private trust within the State of Delaware[1] and Ahmose Amexem El ("El") is purportedly Phoenix's trustee or representative.[2] On March 19, 2018, Phoenix filed two separate complaints, one against Compass Bank/BBVA ("Compass") and the other against Win South Community Credit Union ("Win South" and, collectively with Compass "Defendants"). The two complaints are nearly identical, save for the specific information about each defendant.[3] Phoenix asks this Court to "set-off/discharge any alleged debt" regarding its accounts with Defendants, as well as to "Return clear title."[4] I infer from the *pro se* complaints that Phoenix is alleging that it owes debts to Defendants, that those debts are secured by property owned by Phoenix, and that Phoenix is seeking discharge of those debts. The complaints do not allege any basis for discharge and Phoenix's various motions shed little light on Phoenix's claims.[5]

Each complaint alleges the defendant is an Alabama entity. The Compass complaint alleges Compass is a corporation "operating within the jurisdiction of the

[1] *Phoenix Management Trust v. Compass/BBVA*, C.A. No. 2018-0194-SEM ("Compass"), Docket Item ("D.I.") 1 at 1; *Phoenix Management Trust v. Win South Credit Union*, C.A. No. 2018-0192-SEM ("Win South"), D.I. 1 at 1.
[2] Compass D.I. 2.
[3] *Compare* Compass D.I. 1 at 1-4 *with* Win South D.I. 1 at 1-4.
[4] Compass D.I. 1 at 3; Win South D.I. 1 at 4.
[5] *See, e.g.*, Compass D.I. 12, 14, 21.

State of Alabama"[6] and that Compass's registered address is in Birmingham, Alabama.[7] The Win South complaint similarly alleges Win South operates in Alabama, from an address in Gadsden, Alabama.[8]

On March 20, 2018, the Register in Chancery issued a summons, along with a letter instructing Plaintiff to provide proof of service under Title 10, Section 3104 of the Delaware Code.[9] On April 27, 2018, Plaintiff filed affidavits of service stating that it "caused copies of the Summons … and Verified Complaint to be sent by United States Postal Service" to Defendants.[10] To support this assertion, Plaintiff provided two screenshots of the USPS tracking website, which indicated that the items were delivered to cities in Alabama on April 5 and 6, 2018.[11] Plaintiff did not provide proof of service signed by any defendant.[12]

On May 23, 2018, Phoenix filed essentially identical motions for summary judgment in each case. On May 28, 2018, Phoenix filed essentially identical motions for default judgment in each case. According to the certificates of service for these

[6] Compass D.I. 1 at 2.
[7] *Id.*
[8] Win South D.I. 1 at 2. I read Plaintiff's *pro se* complaint, as then-Master Zurn did, to plead that Win South is an Alabama corporation.
[9] Compass D.I. 10; Win South D.I. 10.
[10] Compass D.I. 11 at ¶ 2; Win South D.I. 11 at ¶ 2.
[11] Compass D.I. 11, Ex.; Win South D.I. 11, Ex.
[12] *See id.*

motions, Phoenix served them on Defendants via US Mail.[13] Then-Master Zurn recommended the motions be denied in June 2018.[14]

Phoenix did not file exceptions to either the draft or final reports of then-Master Zurn. After the final report issued, though, Phoenix filed a motion to vacate denial of default judgment under Court of Chancery Rule 60(b)(1). To that motion, Phoenix attached signed green cards and argued that, in light of such, service had been perfected and the denial of default should be vacated. At my request, Defendants responded to the motion to vacate on January 28, 2019, arguing (among other things) that, (1) procedurally, Court of Chancery Rule 60 is not appropriate under these circumstance, (2) Compass has never been properly served, and (3) Win South appeared "[o]nce properly served[.]"[15]

After Phoenix's motions to vacate, Compass and Win South each filed motions to dismiss (on September 26, 2018 and July 6, 2018, respectively). In response, Phoenix moved to strike Win South's motion alleging it was time-barred. After an extended period of time passed without Phoenix responding to Defendants'

[13] Compass D.I. 12 at 5; Win South D.I. 12 at 5.
[14] Then-Master Zurn first recommended denial via draft report on June 1, 2018. Compass D.I. 16; Win South D.I. 16. After neither party took exceptions to the draft report, a final report issued on June 19, 2018. Compass D.I. 20; Win South D.I. 20. Notice of exceptions to the final report was due by July 2, 2018; no exceptions were filed. *See* Court of Chancery Rule 144(d)(1).
[15] Win South D.I. 29; Compass D.I. 37.

motions (other than the non-substantive motion to strike), I wrote to Phoenix on January 8, 2019 directing it to "respond on the merits of each Motion to Dismiss within thirty (30) days[.]" Phoenix's responses were due February 7, 2019. To date, nothing has been filed.

II. Analysis

Pending before are (1) Phoenix's motions to vacate, (2) Win South's motion to dismiss and Phoenix's responsive motion to strike; and (3) Compass's motion to dismiss. I address each in turn.

A. Phoenix's Motions to Vacate Should Be Denied.

Phoenix's motions to vacate under Court of Chancery Rule 60 rely on Phoenix's allegation that Defendants failed to timely appear or answer the complaints after service was perfected.[16] I find Phoenix's argument unavailing for a number of reasons and I recommend that its request for relief from judgment pursuant to Court of Chancery Rule 60 be denied. [17]

[16] Compass D.I. 21; Win South D.I. 21.

[17] Phoenix's motion to vacate in the Compass action was, arguably, withdrawn on September 26, 2018 when Phoenix submitted a letter stating that Phoenix "opposes the Motion to Vacate Denial Default Judgment" attaching a document titled "Opposition to Motion to Vacate Denial Default Judgment". Compass D.I. 27-28. Because these submissions are less-than-clear, I, nonetheless, analyze Phoenix's motion on its merits.

First, Phoenix cannot invoke Court of Chancery Rule 60(b)(1). Court of Chancery Rule 60(b)(1) provides that "the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for … [m]istake, inadvertence, surprise, or excusable neglect[.]" By its very terms, Court of Chancery Rule 60(b) is a means for requesting relief "from a final judgment, order, or proceeding"; it does not apply to orders that are not final.[18] Phoenix appears to argue that the denial of default judgment should be vacated due to Phoenix's mistake, inadvertence, or excusable neglect in failing to attach the proofs of service (submitted with the motions to vacate) to the original motions for default judgment. But, the denial of Phoenix's motion for default judgment was not a final judgment; it ensured that the case continued on in this Court and made no determination as to the merits of Phoenix's claims.[19] Thus, Phoenix cannot utilize Court of Chancery Rule 60 to overturn the denial of default judgment.

Second, I find that Phoenix had, but failed to avail itself of, an appropriate avenue through which it could have challenged then-Master Zurn's

---

[18] *See Southpaw Credit Opportunity Master Fund, L.P. v. Roma Rest. Holdings, Inc.*, 2017 WL 3701232, at *1 (Del. Ch. Aug. 22, 2017), *reconsideration denied*, 2017 WL 4570612 (Del. Ch. Oct. 13, 2017).

[19] *See Werb v. D'Alessandro*, 606 A.2d 117, 119 (Del. 1992) (finding appeal of an order vacating a default judgment interlocutory because it was not a final judgment in that "[n]either the merits of the controversy nor the rights of the parties have been finally determined-the antithesis of a final judgment").

recommendation—Court of Chancery Rule 144. Phoenix could have (and, if it wanted to contest then-Master Zurn's rulings, should have) utilized the exception process under Court of Chancery Rule 144 but failed to do so. Because Phoenix failed to file exceptions to the Master's Final Report (notice of which was due July 2, 2018), Phoenix is "deemed to have stipulated to the approval and entry of the report as an order of the Court."[20]

Third, in an attempt not to elevate form over substance, I find Phoenix's substantive arguments for vacating denial of default judgment unpersuasive. Phoenix's service arguments were already addressed by then-Master Zurn in connection with the motions for judgment by default and summary judgment, wherein she concluded that Phoenix had failed to supply sufficient proof of service. Phoenix's belated submission of signed green cards, without more, fails to address then-Master Zurn's concerns as to whether service was perfected (i.e., Phoenix provides no information regarding the authority of the signatories to accept service for Defendants under 10 *Del. C.* § 3104).[21] Thus, even if I were to reconsider then-Master Zurn's Final Report in light of the green card submissions, I would find that Phoenix has, still, failed to provide satisfactory evidence of personal delivery to

[20] Court of Chancery Rule 144(c).
[21] *See* Compass D.I. 20; Win South D.I. 20.

either Defendant and that proof of service is, still, insufficient under 10 *Del. C.* § 3104. In the absence of sufficient proof of service, I could not conclude that Phoenix met its burden of proving either Defendant failed to timely appear after being served such that the decision to deny default judgment should be vacated.

Therefore, I recommend that Phoenix's motions to vacate denial of default judgment be denied.

B. Win South's Motion to Dismiss Should Be Granted and Phoenix's Motion to Strike Denied.

I now turn to Win South's motion to dismiss and Phoenix's motion to strike. Win South moves to dismiss for lack of personal jurisdiction under Court of Chancery Rule 12(b)(2) and 10 *Del. C.* § 3104. Phoenix moved to strike Win South's motion as time-barred; claiming it was filed more than 20 days after Win South was served with the complaint. Phoenix has not responded to the substantive arguments in Win South's motion, despite being directed to do so.

Addressing the motion to strike first, I asked Win South to respond to the motion to strike, primarily to understand Win South's position on when it was served and the timeliness of its motion. While Win South did respond as directed, it stated only that "[o]nce properly served, Defendant appeared through counsel, and responded to Plaintiff's filings on July 6, 2018, with a Motion to Dismiss pursuant

to Court of Chancery Rule 12(b)(2)[.]"[22] From Win South's motion, it appears Win South was served on June 12, 2018.[23] Thus, the motion to dismiss was, seemingly, filed four days late.[24] Phoenix would have me strike Win South's motion to dismiss based upon this four-day discrepancy and treat Win South has having failed to respond to the complaint—leading to Phoenix's preferred outcome of default judgment against Win South. I find that it would be inequitable to do so under these circumstances.

As this Court has recognized, default judgment "is permissive, not mandatory, and gives the Court discretion to decide whether to enter a default judgment based on the particular set of facts before it."[25] Entry of default judgment and, here, the functional equivalent of striking Win South's motion to dismiss to bolster a request for entry of default judgment, would be an extreme remedy, which is typically reserved for situations where there is "a willful or conscious disregard for the rules of the Court."[26] Where, as here, the defendant "does participate in the proceedings, and where the plaintiff has not presented any prejudice from any delay, the

[22] Win South D.I. 29 at 3.
[23] *See* Win South D.I. 24 at 3 ("WinSouth received the Complaint on June 12, 2018 by Certified First Class Mail.")
[24] The Motion to Dismiss was filed on July 6, 2018, 24 days after "receipt" (presumably service) of the complaint on June 12, 2018. *See id.*
[25] *Tabb v. Bank of N.Y. Mellon*, 2017 WL 2570020, at *1 (Del. Ch. June 14, 2017).
[26] *Id.* (internal citations and quotation marks omitted).

defendant's lax participation may not warrant imposition of the extreme remedy of a default judgment in the early stages of litigation."[27] Under the current circumstances, I find Win South's delay harmless and non-prejudicial to Phoenix. I, therefore, recommend that Phoenix's motion to strike Win South's motion to dismiss be denied and Win South's motion to dismiss be evaluated on its merits.

Turning to Win South's substantive grounds for dismissal, Win South argues that this Court lacks personal jurisdiction over Win South under Court of Chancery Rule 12(b)(2). "When a defendant moves to dismiss a complaint pursuant to Court of Chancery Rule 12(b)(2), the plaintiff bears the burden of showing a basis for the [C]ourt's exercise of jurisdiction over the defendant."[28] Phoenix has neither responded to the substance of Win South's motion to dismiss (even after I directed that it to do so), nor met its burden of showing a basis for this Court's jurisdiction over Win South. And, even giving Phoenix the benefit of every reasonable inference from its pleadings, I find Phoenix's allegations insufficient to find general or specific jurisdiction over Win South. Win South is not a Delaware corporation, nor does it have its principal place of business in Delaware, such that general jurisdiction would

[27] *Id.*
[28] *iBio, Inc. v. Fraunhofer-Gesellschaft zur Forderung der Angewandten Forschung E.V.*, 2018 WL 6493503, at *2 (Del. Ch. Dec. 10, 2018) (internal citations omitted).

be warranted.[29] Further, Phoenix has not plead anything supporting the exercise of specific jurisdiction over Win South under 10 *Del. C.* § 3104(c), let alone that exercise of such jurisdiction would comport with due process.[30] Therefore, I recommend that Win South's motion to dismiss for lack of personal jurisdiction be granted.

C. Compass's Motion to Dismiss Should Be Granted.

Finally, I turn to Compass's motion to dismiss. Compass moves to dismiss the complaint for failure to state a claim under Court of Chancery Rule 12(b)(6) arguing (1) private trusts cannot sue *pro se*, (2) the complaint is "incomprehensible and illogical", failing to provide notice to Compass of the claims against it, and (3) Phoenix is not entitled to the relief purportedly requested.

---

[29] *See id.*

[30] *Id.* There is nothing in the record that Win South "(1)Transacts any business or performs any character of work or service in the State; (2) Contracts to supply services or things in this State; (3) Causes tortious injury in the State by an act or omission in this State; (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State; (5) Has an interest in, uses or possesses real property in the State; or (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing." 10 *Del. C.* § 3104(c).

The standards governing a motion to dismiss for failure to state a claim for relief are well settled:

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.[31]

Although, "[t]he Court will view pleadings filed *by pro se* litigants with forgiving eyes. … proceeding *pro se* will not relieve Plaintiffs of their obligation to 'allege sufficient facts to state a plausible claim for relief' or 'to present and support cogent arguments warranting the relief sought.'"[32] I find that Phoenix has failed to meet its obligation and the complaint against Compass fails to state a claim for which relief can be granted.

Giving Phoenix's complaint against Compass every reasonable inference, it appears to be a claim to set-off or discharge a mortgage held by Compass, account # 0058621161.[33] With its motion to dismiss, Compass has provided by attorney affidavit a verified true and correct copy of the only mortgage held by Compass with

---

[31] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002) (internal quotation marks and citations omitted).
[32] *Hall v. Coupe*, 2016 WL 3094406, at *2 (Del. Ch. May 25, 2016) (internal citations omitted).
[33] Compass D.I. 1 at 3 ("Plaintiff demands Defendant to set-off/discharge any alleged lawful debt in the matter of account # 0058621161, dischargeable to [Compass] …; Return clear title to Plaintiff").

that account number.[34] I can and do consider the full version of the mortgage provided by Compass as incorporated into Phoenix's complaint under the incorporation-by-reference doctrine.

"When a plaintiff expressly refers to and heavily relies upon documents in her complaint, these documents are considered to be incorporated by reference into the complaint; this is true even where the documents are not expressly incorporated into or attached to the complaint."[35] "The incorporation-by-reference doctrine permits a court to review the actual document to ensure that the plaintiff has not misrepresented its contents and that any inference the plaintiff seeks to have drawn is a reasonable one."[36] When incorporation-by-reference is appropriate, "a complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations."[37] Similarly, "a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law."[38]

---

[34] Compass D.I. 30, Goeller Aff. Ex. A.
[35] *Freedman v. Adams*, 2012 WL 1345638, at *5 (Del. Ch. Mar. 30, 2012).
[36] *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016).
[37] *Id.* (citing *H-M Wexford LLC v. Encorp Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003)).
[38] *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

These principals aptly apply here. First, incorporation by reference of the mortgage agreement is appropriate because the mortgage is expressly referenced in the complaint by account number and identified as "dischargeable to" Compass. Second, I find that the unambiguous language of the mortgage agreement shows that Phoenix is not a signatory to the debt, which contradicts the allegations in the complaint and negates Phoenix's claims as a matter of law. Dismissal is, therefore, warranted because Phoenix has failed to state a claim for set-off or discharge of a mortgage to which it was not a signatory and in which it has failed to allege any other interest.

I, therefore, recommend that the Court grant Compass's motion to dismiss.[39]

[39] In so recommending, I am giving Phoenix every reasonable inference from its pleadings and decline to address Compass' alternative arguments that the complaint should also be dismissed as "incomprehensible and illogical", failing to give Compass adequate notice of the claims against it, and due to Phoenix's allegedly-improper *pro se* status.

III. Conclusion

For the foregoing reasons, I find that Phoenix is not able to vacate the denial of default judgment recommended by then-Master Zurn under Court of Chancery Rule 60 and that Phoenix's complaints against Win South and Compass should be dismissed for lack of personal jurisdiction and failure to state a claim, respectively. Accordingly, I recommend that the Court deny Phoenix's motions to vacate and strike and grant Defendants' motions to dismiss. This is my final report in this matter and exceptions should be taken in accordance with Rule 144.

Respectfully,

/s/ Selena E. Molina

Master in Chancery