

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

PNC BANK, DELAWARE,	)	
	)	
Plaintiff,	)	
	)	Judgment No. 05J-01-076
v.	)	Judgment No. 05J-01-077
	)	
DAVID N. SILLS, IV and	)	
DAYSTAR SILLS, INC.,	)	
	)	
Defendants.	)	

Submitted: July 5, 2006  
Decided: November 30, 2006

**UPON DEFENDANTS' MOTION TO VACATE CONFESSION OF JUDGMENT  
DENIED**

**MEMORANDUM OPINION**

Martin J. Weis, Esquire, Dilworth Paxon LLP, Wilmington, Delaware, Attorney  
for Plaintiff

Stephen W. Spence, Esquire, Phillips, Goldman & Spence, P.A., Wilmington,  
Delaware, Attorney for Defendants

**JOHNSTON, J.**

## **FACTS AND PROCEDURAL CONTEXT**

Mission Bound LLC is a Delaware limited liability company formed by David N. Sills (“Sills”) and Bradford Mitchell (“Mitchell”) for the purpose of purchasing a 38-foot boat named “Mission Bound.”

The Mission Bound was purchased by Mission Bound LLC in April of 1999 with funds borrowed from PNC Bank, Delaware (“PNC”). The PNC loan<sup>1</sup> was guaranteed by Mitchell, Sills and Daystar Sills, Inc. (“Daystar”). PNC recorded a preferred ship mortgage against the Mission Bound with the United States Coast Guard.

Mission Bound LLC started a charter fishing enterprise in Cape May, New Jersey. The venture was unsuccessful. In September 2004, Mission Bound LLC defaulted on the PNC loan.

In January 2005, PNC initiated proceedings to confess judgment against Sills and Daystar, based upon their guaranty agreements.<sup>2</sup> Notice was served by certified mail to Sills and to Daystar, addressed to Daystar Sills, Inc., 330 Water Street, Wilmington, Delaware 19804. The certified mailings were received and signed for on January 18, 2005 by Leona Kupeski, a Daystar employee. On

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<sup>1</sup>The loan was in the principal amount of \$225,000.

<sup>2</sup>Plaintiff sought the following amounts: \$135,646.56 (principal); \$1,536.86 (accrued interest); \$13,718.34 (attorneys’ fees); and \$440.48 (interest and costs).

February 4, 2005, the Prothonotary issued final judgments on the confessed judgments after Sills and Daystar failed to appear in Superior Court to object to the entry of the judgments.

PNC sold the Mission Bound in March 2005. The guarantors received a credit of \$118,802.73 as a result of the sale. In addition to selling the Mission Bound, PNC also set off certain bank accounts of Mitchell in order to collect on the loan. After considering the additional accrual of interest and attorneys fees, PNC claims that there is an outstanding loan balance of approximately \$60,000.

On January 20, 2006, PNC Bank initiated proceedings to execute upon the confessed judgments against Sills and Daystar. On March 13, 2006, Daystar and Sills filed an Objection to Execution and Motion to Vacate Confession of Judgment pursuant to Superior Court Rule 60(b).

On March 17, 2006, this Court held an evidentiary hearing. At that hearing, the Court heard the testimony of Frank Devine, the PNC Bank officer responsible for the account; Sills; and Susan Trolio, a certified public accountant who served as Daystar's controller.

Defendants argue that the Court should vacate the confessed judgment because: (i) Defendants did not receive adequate notice under Superior Court Civil Rule 58.1; (ii) Article 9 of the UCC is applicable, and PNC is barred from

bringing a deficiency claim action against Defendants; and (iii) PNC is equitably estopped from pursuing a deficiency judgment against the Defendants.

### **LEGAL STANDARD FOR VACATION OF A JUDGMENT**

To determine whether the entry of the confessed judgment should be vacated, the Court must consider: (i) whether service of the notice letter was proper; (ii) whether Defendants have a meritorious defense; and (iii) whether the delay between the entry of confession of judgment and filing of the motion to vacate was justified.

Superior Court Civil Rule 58.1 outlines the procedures for entry of a judgment by confession authorized by 10 *Del. C.* § 2306.

### **ADEQUACY OF NOTICE**

The Rule 58.1 notice procedure requires: “(d) The notice letter required by paragraph (a)(4) shall be mailed by the Prothonotary to each debtor by certified mail, return receipt requested, together with a copy of the instrument authorizing confession of judgment and, where applicable, a copy of the affidavit required by 10 Del. Code § 2306(c).”

Defendants argue that as to Daystar, a Delaware corporation, Rule 4(f)(1)(III) applies in conjunction with Rule 58.1. Rule 4(f)(1)(III) provides that service shall be made upon domestic corporations by delivery of the relevant

documents to “an officer, a managing or general agent or to any other agent authorized by law to receive service of process.” In this case, the certified mailing return receipt card indicates that an account manager, Leona Kupeski, who was sitting in for the receptionist, signed for the mailing. Daystar argues that because Kupeski was neither an officer of Daystar nor an agent authorized to receive service, service is invalid.

Sills argues that, as an individual, Rule 4(f)(1)(I) applies in conjunction with Rule 58.1. Rule 4(f)(1)(I) provides that service shall be made by delivering to “that individual personally or by leaving copies thereof at that individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering copies thereof to an agent authorized by appointment or by law to receive service of process.” PNC did not serve Sills at his home. The certified mail return receipt card indicates that Kupeski signed for the mailing. Sills argues that because Kupeski is not an agent authorized to receive service on his behalf, service is invalid.

PNC counters that the service of notice of the confessed judgment was proper and adequate because the notice went to the correct address, and was signed by a Daystar employee. The Guaranty and Suretyship Agreements (the “Agreements”) list the address of both Daystar Sills, Inc. and David N. Sills, IV

(c/o Daystar Sills, Inc.) as 330 Water Street, Wilmington, Delaware 19804.

Paragraph 10 of the Agreements provides:

Notices. All notices, demands, requests, consents, approvals and other communications required or permitted hereunder must be in writing and will be effective upon receipt if delivered personally, or if sent by facsimile transmission with confirmation of delivery, or by nationally recognized overnight courier service, to the addresses for the Bank and the Guarantor set forth above or to such other address as one may give to the other in writing for such purpose.

PNC asserts that the contact language provides sufficient evidence of the parties' intent that all notices served upon this address would be adequate.

It is uncontested that the business address where the notices were sent housed an operating business and that the notice was delivered and accepted by Kupeski, a Daystar employee. The address was where the Defendants contractually agreed to accept service. There is no evidence that the guarantors provided written notice to PNC of another address.

The Defendants chose to put Kupeski at the front desk to receive mail and deliveries. The facts demonstrate that Kupeski at least had apparent authority to accept a notice letter sent by the Prothonotary.

When a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business uses and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the

particular act in question, and such particular act has been performed, the principal is estopped to deny the agent's authority to perform it.<sup>3</sup>

The Prothonotary sent the notices to Daystar and Sills by certified mail, return receipt requested, as required by Rule 58.1, to the address specifically listed in the guaranty agreements. The mailing card came back as delivered. The requirements for sending notice of a confessed judgment are outlined in detail in Rule 58.1. Although Rule 4 service of process procedures may be looked to to determine the sufficiency of the notice, Rule 4 does not place additional service burdens on the party entitled to entry of judgment by confession. The Court finds that notice to Daystar and Sills was proper pursuant to Rule 58.1.

The term "address," as it pertains to individuals, has a peculiar meaning in law because of the significance of notice. Notice and opportunity to be heard are required as due process before one can be deprived of property.<sup>4</sup> Notice must be such that it is reasonably calculated to reach the interested parties to apprise them of the pendency of an action.<sup>5</sup> To insure each notice, reasonable steps must be

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<sup>3</sup>*Finnegan Construction Co. v. Robino-Ladd Co.*, 354 A.2d 142, 145 (Del. Super. 1976) (citing *Frye v. E. I. du Pont de Nemours & Co.*, 129 Me. 289, 151 A. 537, 540 (1930)).

<sup>4</sup>*East Coast Insulation Sales Co., Inc. v. Stevenson*, 1990 WL 122994, at \*1 (Del. Super.) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

<sup>5</sup>*Id.*

made to ascertain an individual's address, when the proceeding is against an individual.<sup>6</sup>

### **DEFICIENCY CLAIM**

Daystar and Sills claim that PNC is not entitled to a deficiency claim for the following reasons:

(i) Article 9 of the UCC is applicable to this transaction. Paragraph 18 of the Agreements provides that Delaware law must be applied in determining the rights and liabilities of PNC and the guarantors.

(ii) Daystar and Sills could not have, and did not, waive their rights to notice. Former UCC Section 9-504 was applicable in 1999, and requires that reasonable notification of impending disposition be given to the debtor. It is incumbent upon the secured creditor to notify the guarantor of an impending disposition of collateral. Under former UCC Section 9-501, notice cannot be waived in any prior agreement. The majority view is that the guarantor cannot waive notice of a foreclosure sale in a guaranty agreement or promissory note.<sup>7</sup>

(iii) Defendants did not receive notice.

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<sup>6</sup>*East Coast Insulation Sales Co., Inc. V. Stevenson*, 1990 WL 122994, at \*1 (Del. Super.) (citing *Webster v. Ferm*, Del. Super., C.A. No. 83C-OC-50, Martin, J. (Apr. 24, 1986)).

<sup>7</sup>*See Gambo v. Bank of Maryland*, 648 A.2d 1105, 1110-11 (Md. 1994).

(iv) PNC failed to sell the Mission Bound in a commercially reasonable manner.

### ***Judicial Sale Under Admiralty Law***

PNC purchased the Mission Bound under the admiralty laws of the United States of America at a judicial sale. Pursuant to 28 U.S.C. §1333, 28 U.S.C. §1331, and 46 U.S.C. §31325(c), the District Court for the District of Maryland had exclusive jurisdiction over the action to seize and sell the boat to enforce a preferred mortgage lien in an *in rem* admiralty proceeding.<sup>8</sup> The District Court of Maryland ordered a judicial sale of the Mission Bound. The sale was conducted pursuant to that Order and local admiralty rules. Following that sale, PNC listed the boat with a broker and sold it.

In order for the District Court of Maryland to confirm the completion of the judicial sale of the Mission Bound, PNC was required to satisfy the following notice provisions of the District of Maryland Local Admiralty Rules:

- (1) publication in a newspaper of general circulation;

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<sup>8</sup>See *Md. Nat'l Bank v. Traenkle*, 10 Fed. Appx. 194, 196-97 (4<sup>th</sup> Cir. 2001) (affirming lower court's holding that Ship Mortgage Act preempted Maryland law regarding personal notice and deficiency judgments); *Fourchon Inc. V. La. Nat'l Leasing Corp.*, 723 F.2d 376, 383 (5<sup>th</sup> Cir. 1984) (holding that Ship Mortgage Act preempted Louisiana state law's caps on interests rates.)

(2) service of the complaint and warrant of arrest upon the United States Marshal and custodian of the boat; and

(3) mailing the complaint and warrant of arrest to all persons having an ownership interest in the vessel.<sup>9</sup> The exhibits presented during the March 17, 2006 hearing evidence that PNC notified all persons with an interest in the boat of the seizure action.

Further, the Ship Mortgage Act does not require the mortgagee to give notice to a guarantor of a judicial sale as a predicate for deficiency judgment against him for the outstanding debt.<sup>10</sup>

#### *Article 9 Waiver of Notice*

PNC argues that the guarantors contractually waived the protections of Article 9's notice provisions. Paragraph 2 of the Agreements provides:

Notice of acceptance of this Guaranty, notice of extensions of credit to the Borrower from time to time, notice of default, diligence, presentment, notice of dishonor, protest, demand for payment, and any defense based upon the Bank's failure to comply with the notice requirements of the applicable version of Uniform Commercial Code § 9-504 are hereby waived.

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<sup>9</sup>District of Maryland Local Admiralty Rule (c)(3)(a)(I).

<sup>10</sup>*See Knauss v. Dwek*, 289 F.Supp.2d 546, 553 (D. NJ 2003).

Daystar and Sills contend that notice cannot be waived pursuant to a prior agreement.

Guarantors are not entitled to the same protections as debtors. Guarantors may waive notice by prior agreement.<sup>11</sup> Daystar and Sills are sophisticated parties and had access to competent legal counsel. Therefore, the Court finds that Daystar and Sills voluntarily waived the protections of the UCC notice provisions by contract.

### *Adequacy of Notice*

Even under Article 9, Daystar and Sills received adequate notice of the sale. Article 9 requires that the creditor give “reasonable notification” to the debtor prior to selling the repossessed collateral. The notices of judicial sale were sent to 330 Water Street, Wilm., DE 19801, and were received by a Daystar employee. The notices were not returned to PNC. The fact that all mail addressed to MissionBound LLC was forwarded unopened to Brad Mitchell does not alter the Court’s analysis. The method of handling mail received was entirely within the control of the guarantors.

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<sup>11</sup>See *U.S. v. H & S Realty Co*, 837 F.2d 1, 3 (1<sup>st</sup> Cir. 1987); *U.S. v. Lattaudio*, 748 F.2d 559, 562 (10<sup>th</sup> Cir. 1984); *U.S. v. Kukowski*, 735 F.2d 1057, 1058 (8<sup>th</sup> Cir. 1984); *U.S. v. Southern Cycle Accessories, Inc.*, 567 F.2d 296, 298 (5<sup>th</sup> Cir. 1978); *U.S. v. Bertie*, 529 F.2d 506, 507 (9<sup>th</sup> Cir. 1976); *Bank of N.J. v. Heine*, 464 F.2d 1161, 1162 (3d Cir. 1972); *Chrysler Credit Corp v. Curley*, 753 F.Supp. 611, 614 (E.D. Va. 1990); *Continental Leasing Corp. V. Lebo*, 272 A.2d 193, 197 (Pa. Super. 1970).

### ***Commercially Reasonable Sale***

Under Revised Article 9, once a debtor places at issue a secured party's compliance with the provisions of Revised Article 9, the secured party is required to make a showing that it conducted any resale of repossessed non-consumer collateral in a "commercially reasonable" fashion, in order to be able to recover any alleged deficiency judgment from debtors.

The judicially-approved sale was made at public auction. PNC engaged in communications with the guarantors. The United States Marshal's public auction was conducted pursuant to Federal law authorizing such sale. The United States District Court of Maryland confirmed the sale.

During the hearing in this Court, PNC presented evidence that it was able to recover almost 93% of the appraised fair market value of \$140,000. The PNC representative testified that the value of the collateral would continue to decrease and not increase. Further, the costs of sale would increase both with regard to actual costs of dockage fees and storage fees. Also, PNC avoided a higher commission to the broker due to the shortened period of sale. The collateral was sold in an arm's-length transaction to a non-PNC customer who purchased the boat for cash. PNC had no relationship with the purchaser. The Court concludes that PNC's sale of the Mission Bound was commercially reasonable under Article

9. PNC concedes that Daystar and Sills are entitled to a credit of \$128,802.73 for the sale of the Mission Bound, instead of \$118,802.73 which they received.<sup>12</sup>

### **EQUITABLE ESTOPPEL**

The party claiming equitable estoppel must have suffered a prejudicial change of position as a result of its reliance.<sup>13</sup> Daystar and Sills argue that had they “not relied on Devine’s misrepresentations about PNC pursuing Mitchell first, they would not have provided PNC with the information that ultimately lead to PNC’s repossession of the boat, and these confessed judgment proceedings.” Thus, they claim that but for PNC’s alleged misrepresentation, they would not have cooperated with PNC’s efforts to locate the collateral. The alleged prejudicial change was the decision to help PNC locate the collateral.

PNC counters that had Daystar and Sills not cooperated with PNC’s efforts to locate the boat, PNC may never have found the Mission Bound and thus Daystar and Sills would have faced the full liability instead of the deficiency created by the sale of the collateral. Further, the guaranty documents permit PNC to collect the cost of locating the collateral from the guarantors.

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<sup>12</sup>The \$128,802.73 figure includes PNC’s assumption that the gross amount of the sale proceeds should be offset by \$11,197.27 in expenses.

<sup>13</sup>*Denison v. Redefer*, 2005 WL 3416422 at \*3 (Del. Super.)

The Guarantors contend that PNC agreed to pursue Bradford Mitchell first before pursuing Sills and Daystar. PNC denied that it agreed to pursue Mitchell first. Daystar and Sills alleged agreement was not reduced to writing. The PNC representative testified that PNC informed Daystar's controller that the bank was going to take whatever steps necessary against all guarantors.

The evidence at the hearing demonstrated that PNC first seized the Mission Bound to collect on the loan. PNC also took all of Mitchell's bank accounts as a set-off against the amount due under the loan. Daystar's controller provided PNC with information regarding assets, including the location of the boat and Mitchell's accounts. PNC acted on that information.

The record does not establish any basis for imposition of equitable estoppel as a defense.

### **RULE 60 RELIEF FROM JUDGMENT**

It is the policy of this Court under Rule 60(b)(1) to favor the disposition of cases on their merits. This consideration must be balanced in the particular circumstances of every case against the interest in preserving the finality of judgments and in insuring that there is an end to litigation.<sup>14</sup> The balance frequently turns on the question of whether the conduct of a party moving under

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<sup>14</sup>*Hallock v. Weiner*, 1988 WL 116421, at \*1 (Del. Super.).

Rule 60 to set aside a judgment was the conduct of a reasonably prudent person.<sup>15</sup>

The party seeking relief also must establish: (1) the possibility of a meritorious defense; and (2) the lack of substantial prejudice to the non-moving party.<sup>16</sup>

The Court's determination that Sills did not have notice of proceedings to confess judgment, but Daystar did, is not dispositive. Applications to open judgment by confession are equitable in nature, are addressed to the discretion of the Court and are to be disposed of in accordance with the principles of equity.<sup>17</sup> Defendants have not provided the Court with any legal theory that would constitute a meritorious defense. There is no doubt that the debt exists and that Defendants defaulted on the PNC loan.

Apart from the issue of meritorious defense, Defendants have not adequately addressed the matter of more than a year's delay between the entry of judgment and filing of the motion to vacate judgment. The generally accepted recourse available to confessed judgment debtor, upon learning of the existence of the judgment, is to file a motion to vacate or open the judgment pursuant to Rule

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<sup>15</sup>*Id.* (citing *Cohen v. Brandywine Racing Association*, 238 A.2d 320, 325 (Del. Super. 1968)).

<sup>16</sup>*Id.* (citing *Keith v. Melvin L. Joseph Construction Co.*, 451 A.2d 842, 846 (Del. Super. 1982)).

<sup>17</sup>*See Sussex Fin. Co. v. Goslee*, 82 A.2d 743, 745 (Del. Super.1951).

60(b).<sup>18</sup> When a petition to open a judgment by confession is addressed to the sound discretion of the Court, the moving parties must show either that they acted with reasonable diligence or that they have a reasonable excuse for the delay.<sup>19</sup> Approximately a year transpired between the date of the entry of the judgment and the filing by Daystar and Sills of their Objection to Execution on Confessed Judgment.

The time allowed for filing a motion to open a judgment is a matter of the Court's discretion.<sup>20</sup> The Court finds that Defendants had actual knowledge of the entry of judgment shortly after the date of entry and that almost a year transpired between the date of entry of judgment and the filing of Defendants' motion. Therefore, Daystar and Sills have failed to act with reasonable diligence.

### **CONCLUSION**

Pursuant to the requirements of Rule 58.1, notice of the entry of judgment by confession upon Daystar Sills, Inc. and David N. Sills, IV was proper. PNC is entitled to a deficiency claim whether or not Article 9 of the UCC applies to the

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<sup>18</sup>*Osmond v. Spence*, 327 F.Supp. 1349, 1355 (D. Del. 1971), *vacated and remanded on other grounds*, 405 U.S. 971, 92 S.Ct. 1189, 31 L.Ed.2d 245 (1972).

<sup>19</sup>*Patton v. Pyle*, 155 A.2d 55, 56 (Del. 1959).

<sup>20</sup>*Id.* (6-month delay determined unreasonable delay); *Jones v. Laderman*, 198 A. 528 (Del. Super. 1938) (8-1/2 month delay unreasonable).

transaction. The sale of the collateral was conducted in a commercially reasonable manner. There is no basis for imposition of equitable estoppel to bar the deficiency claim. Defendants have failed to demonstrate either the possibility of a meritorious defense or lack of substantial prejudice to Plaintiff. Therefore, Defendants' Motion to Vacate Confession of Judgment is hereby **DENIED**.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston