COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION	:	
	:	**CASE NO. 2012 CVE 00891**
Plaintiff	:	
vs.		**Judge McBride**
	:	
MARCIA FERTIG, et al.,	:	**DECISION/ENTRY**
Defendants	:	

Reimer, Arnovitz, Chernek & Jeffrey Co., L.P.A., Douglas A. Haessig, attorney for the plaintiff JPMorgan Chase Bank, P.O. Box 39696, 30455 Solon Road, Solon, Ohio 44139.

Duncan Simonette, Inc., Brian K. Duncan, Brett E. Schmied, and Jordan R. Bernadino, attorneys for the defendant Marcia Fertig, 155 East Broad Street, Suite 2200, Columbus, Ohio 43215.

This cause is before the court for consideration of a motion to vacate default judgment filed by the defendant Marcia Fertig.

The court scheduled and held an evidentiary hearing on the motion to vacate on February 15, 2013. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The plaintiff JPMorgan Chase Bank filed its complaint for foreclosure in the present case on May 10, 2012. The defendant Marcia Fertig was served via certified mail on May 22, 2012 and was also personally served on June 1, 2012.

Ms. Fertig failed to file any responsive pleading. On September 6, 2012, the plaintiff filed a motion for default judgment which was granted by this court on September 19th.

The defendant filed the present motion to vacate that default judgment on January 17, 2013. In her motion, the defendant moves under Civ.R. 60(B)(1), arguing that the circumstances surrounding her failure to file a timely responsive pleading constitute excusable neglect.

At the evidentiary hearing on this matter, Newell Crane, the defendant's son, testified in support of the motion to vacate. Crane testified that Marcia Fertig appointed him as her power of attorney in 2002. After he became aware of the present action, he contacted counsel for the plaintiff but was not able to make contact with him. Crane also contacted Chase Bank and began to work on a solution with the bank that would essentially allow him to pay the defendant's mortgage payments. The first attempt was rejected by the bank due to insufficient income, and Crane is currently working with the

bank after offering more income to be put toward the calculations. Crane testified that he did not file an answer in the present case because the bank said they were working through this and would call the attorneys when the loan workout went through.

LEGAL ANALYSIS

Pursuant to Civil Rule 60(B):

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."

"In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must establish that [he] has a meritorious defense or claim to present if relief is granted; that [he] is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and that the motion is made within a reasonable time."[1] "These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the

[1] *Washington Mutual Bank v. Christy* (Jan. 12, 2004), 12th Dist. No. CA2003-03-075, 2004-Ohio-92, citing *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, at paragraph two of the syllabus.

requirements is not met."[2] "Civ.R. 60(B) is remedial and should be liberally construed so the ends of justice may be served."[3]

"When a hearing is held on a motion to vacate, a reviewing court must examine the evidence introduced at the hearing in addition to the evidentiary materials submitted with the motion itself."[4] "Ultimately * * * the determination of whether relief from judgment should be granted is addressed to the sound discretion of the trial court * * * ."[5]

The present motion is made pursuant to Civ.R. 60(B)(1) and was filed within one year of the filing of the default judgment entry. As such, the motion is timely.

The court must next consider whether the defendant's failure to file a timely responsive pleading in this matter constitutes excusable neglect. When determining whether neglect is "excusable" a court "must consider all of the surrounding facts and circumstances."[6] The term "excusable neglect" is an elusive concept in the law that the Ohio Supreme Court has defined in the negative, stating that " 'the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.' "[7] "The Supreme Court has also stated that "the concept of 'excusable neglect' must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed, while bearing in mind that Civ.R. 60(B)

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[2] *Banfield v. Brodell* (Sept. 27, 2006), 7th Dist. No. 06-MA-8, 2006-Ohio-5267, at ¶ 10, citing *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174, 637 N.E.2d 914.
[3] Id., citing *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, 665 N.E.2d 1102.
[4] *Rafalski v. Oates*, 17 Ohio App.3d 65, 66, 477 N.E.2d 1212, 1214 (Ohio App. 8th Dist., 1984), citing *Bates & Springer, Inc. v. Stallworth*, 56 Ohio App.2d 223, 382 N.E.2d 1179 (Ohio App. 8th Dist., 1978).
[5] *Classic Oldsmobile, Inc. v. 21st Century Painting, Inc.* (Feb. 12, 1999), 11th Dist. No. 98-L-040, 1999 WL 545750, at *3, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122.
[6] *Bank of Am., N.A. v. Malone* (Aug. 9, 2012), 10th Dist. Nos. 11AP-860 and 11AP-1085, 2012-Ohio-3585, ¶ 8, citing *Winona Holdings, Inc. v. Duffey*, 10th Dist. No. 10AP–1006, 2011–Ohio–3163, ¶ 12.
[7] Id., quoting *Kay*, supra, 76 Ohio St.3d at 20.

constitutes an attempt to 'strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done."[8]

In general, "a party's failure to 'to plead or respond after admittedly receiving a copy of a court document is not 'excusable neglect.' "[9] " * * *[A] majority of the cases finding excusable neglect also have found unusual or special circumstances that justified the neglect of the party or attorney."[10] Looking at Black's Law Dictionary, one court noted the following distinction:

> " '[E]xcusable neglect' [means] * * * 'a failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.' * * * In contrast, mere 'neglect' means 'to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in the doing or omission of a given act. And it may mean a designed refusal, indifference, or unwillingness to perform one's duty.' "[11]

Another court has held that "excusable neglect is not present if the party could have prevented the circumstances from occurring."[12]

In the case at bar, the named defendant is physically and/or psychologically infirm, which is the reason she appointed her son Newell Crane as her power of attorney. Crane testified that he did not see the summons and compliant right away but, once he did, he called both plaintiff's counsel and the bank.

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[8] Id., quoting *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 248, 416 N.E.2d 605.
[9] *PHH Mtge. Corp. v. Northrup* (Dec. 27, 2011), 4th Dist. No. 11CA6, 2011-Ohio-6814, ¶ 16, quoting *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525, 706 N.E.2d 825 (Ohio App. 4th Dist., 1997).
[10] Id.
[11] Id. at ¶ 17, quoting *Vanest*, supra, at fn. 8 and fn. 13, quoting Black's Law Dictionary (6 Ed.1990) 566.
[12] *Malone*, supra, ¶ 8, citing *Porter, Wright, Morris & Arthur, LLP v. Frutta Del Mondo, Ltd.,* 10th Dist. No. 08AP–69, 2008–Ohio–3567, ¶ 22.

In her motion, the defendant argues that Crane was "ignored" by plaintiff's counsel. However, Crane's power of attorney would not give him the right to engage in the practice of law, as he is not a licensed attorney.[13] As Crane is not a named party in the case and was also not an attorney representing Fertig, counsel for the plaintiff had no duty or responsibility to make contact with him or speak with him about the present case. Crane admitted at the hearing on this matter that he had the authority from the outset of the present action to hire an attorney on his mother's behalf and did not do so until January 2013.

The bank, however, did speak with Crane and attempted to work out a solution whereby Crane would use his own money to pay Fertig's mortgage payments. Crane stated at the hearing on this matter that he did not file an answer in this case because the bank told him they were working through this and would call the attorneys when the loan workout went through. Unlike cases where banks have told borrowers they did not need to engage counsel or file an answer, in the present case, Crane made the choice not to file an answer due to his own assumptions and expectations. While he was of the opinion that using his income to pay the mortgage payments was beneficial to all the parties, he did not appear to the court to be ignorant of the possibility that the bank could reject the proposal. The bank never told Crane that an answer would not need to be filed or that he should not seek the services of an attorney in this matter. At least one Ohio court has held that a defendant, who has been served with a complaint and who simply believes that being involved in loan modification negotiations means that

[13] *Ohio State Bar Assn. v. Lienguard, Inc.* (2010), 126 Ohio St.3d 400, 934 N.E.2d 337, 2010-Ohio-3827, ¶¶ 9 and 11 (A general power of attorney does not grant authority to prepare and file papers in court on another's behalf. When a person not admitted to the Ohio bar attempts to represent another on the basis of power of attorney, he commits the unauthorized practice of law.).

she does not have to address the pending foreclosure action, does not commit excusable neglect.[14]

While the defendant's failure to file a timely responsive pleading in the present case does constitute neglect, this court does not find that said neglect was excusable. The defendant's power of attorney failed to file an answer or engage counsel until four months after the default judgment entry was filed due to his hope and expectation that the loan workout would go through, not due to any unforeseen hindrance or accident or any fraudulent or misleading promise by the bank. As a result, the court finds that the defendant has failed to establish excusable neglect under Civ.R. 60(B)(1).

As noted above, the three-part test for examining a motion to vacate judgment is conjunctive, meaning that if one prong is not met, the motion must be denied. The defendant has failed to establish that she is entitled to relief under Civ.R. 60(B)(1), which is the subsection under which she moved. As such, the motion to vacate must fail.

[14] *Bank of New York v. Stilwell* (Sept. 7, 2012), 5th Dist. No. 12CA3, 2012-Ohio-4123, ¶¶ 24-26.

CONCLUSION

The defendant's motion to vacate default judgment is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 9th day of April 2013 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride