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BANKING ALERT

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New Jersey Appellate Division Affirms Default Judgment in Equipment Financing Collection Action

In *BMO Harris Bank, N.A. v. RWB Trucking, Inc.*, Docket No. A-1929-19T3 (N.J. App. Div. Jan. 22, 2021), the Appellate Division affirmed orders relating to an action brought by plaintiff BMO Harris Bank, N.A. ("BMO") to collect on two equipment financing loans to defendant RWB Trucking, Inc. ("RWB") and its principal, defendant-guarantor Blake Elfand ("Elfand", together with RWB, "Defendants").

In 2014, RWB executed two loan and security agreements with BMO for the purchase of three trucks totaling approximately $250,000. Elfand executed a separate "continuing guaranty" for both agreements. In May 2016, RWB defaulted on the loans. In October 2016, BMO commenced an action seeking a judgment for the outstanding loan amount and possession of the equipment. Defendants failed to answer and final judgment by default was entered on January 23, 2017. BMO subsequently engaged in asset discovery, to which Defendants failed to respond. BMO obtained an order enforcing litigant's rights, which Defendants again ignored.

Defendants continued to ignore or not respond to information subpoenas and orders from the Court enforcing litigant's rights through June 2019. Guaranty Solutions Recovery Fund 1, LLC, as assignee of the judgment, filed a motion to permit the sale of Elfand's real property, which was granted on July 26, 2019. On August 21, 2019, Elfand filed a motion to vacate the default judgment and order permitting the sale of his real property, claiming: (1) although he had been served with the Complaint in November 2016, he did not respond because he could not afford counsel, constituting excusable neglect and exceptional circumstances; and (2) BMO had failed to mitigate its damages as Elfand claimed he repeatedly requested BMO to repossess the collateral but, at some point in time, it had been stolen before BMO could do so. The trial court denied the motion on September 19, 2019, finding that Elfand's contention that his financial issues constituted excusable neglect were insufficient as Elfand could have represented himself and, in any event, Elfand had not asserted a meritorious defense. As to the destruction of the collateral, the trial court found that it was in Elfand's possession at the time and it

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was Elfand's obligation under the loan agreements to have insurance on the collateral, which Elfand failed to maintain. Elfand subsequently filed a motion for reconsideration, further expounding on his financial problems, claiming a fire destroyed his California home in 2017 and he had failed to receive mail from New Jersey concerning the lawsuit as a result. The trial court denied the motion for reconsideration.

On appeal, the Appellate Division affirmed the trial court's orders denying the motion to vacate the default judgment and order permitting the sale of Elfand's real property and the motion for reconsideration, finding that Elfand's motion was well beyond the one-year limit for motions to vacate a judgment pursuant to Rule 4:50-1. While Elfand had cited Rule 4:50-1(f), which permits a court to vacate a judgment for "any other reason justifying relief from the operation of the judgment or order," the Appellate Division noted that this provision is reserved to the rarest of exceptional circumstances, which were not applicable here. Nothing prevented Elfand from representing himself or obtaining information about the lawsuit. The 2017 fire in California was well after the lawsuit had been filed and default judgment had been awarded.

New Jersey Appellate Division Affirms Final Judgment in Foreclosure Action Where Defaulting Defendant Failed to Establish Meritorious Defense

In *Wells Fargo Bank v. Badouch*, Docket No. A-1787-19T3 (App. Div. January 7, 2021), defendant Maimon Badush obtained a home equity line of credit from Wachovia Bank with a 20-year draw period. The line of credit was secured by a mortgage on property in Lakewood, New Jersey. Wachovia merged into Wells Fargo, and Wells Fargo assumed the mortgage. After Badush defaulted on the note, Wells Fargo sent Badush a notice of intention to foreclosure in accordance with the Fair Foreclosure Act at both the Lakewood property and a Brooklyn address that was on file. Wells Fargo then filed a foreclosure complaint. Badush did not respond, and Wells Fargo moved for entry of default. The application for default was accompanied by an affidavit detailing Wells Fargo's attempts at service: although Wells Fargo was unable to serve Badush at the Lakewood property, Badush was served by leaving a copy of the complaint with a co-occupant of the Brooklyn residence on two occasions.

Three months after default was entered, Badush filed a motion to vacate default. In his motion, Badush certified that he learned of the complaint "through mail solicitation" and that he did not file an answer because he believed the complaint was "inadvertently filed" because it was not served on him. Badush's proposed answer contained boilerplate denials. The trial court denied Badush's motion, finding that Badush failed to raise a meritorious defense and that he lacked good cause to vacate default as result. Over Badush's objection, the trial court then entered final judgment. Badush appealed, challenging only the trial court's refusal to vacate the entry of default.

The Appellate Division affirmed. The Appellate Division started from the baseline that a court may vacate a default if good cause is shown. In deciding whether it is, courts typically look to whether the default was willful, whether granting relief from default would prejudice the opposing party, and whether the party in default has a meritorious defense. The Appellate Division determined that the trial court did not abuse its discretion by focusing on the fact that Badush did not have a meritorious defense -- a necessary element for setting aside a default. As the Appellate Division explained, there is no point in setting aside a default if the defendant has no meritorious defense. The Appellate Division concluded that the record amply supported the trial court's determination that defendant was in default under the note and lacked a defense for the default. The panel also rejected any challenge to the amount due: Badush's generalized objection to the amount due did not satisfy *Rule* 4:64-1(d)(3)'s requirement that such objections be sated with specificity. And, moreover, Wells Fargo's certification setting out the amount due satisfied

the court rules and was corroborated by its business records. Badush's remaining argument lacked sufficient merit to warrant discussion.

New Jersey Federal Court Dismisses Complaint on Abstention Grounds

In *Gurvey v. M&T Bank, Inc.*, 2020 WL 7396289 (D.N.J. Dec. 17, 2020), a federal district court dismissed a complaint asserted against defendants M&T Bank, Inc. (the "Bank") and its counsel filed by borrowers Scott and Amy Gurvey (together, the "Gurveys").

In 2002, the Gurveys obtained a loan from the Bank's predecessor, Hudson City Savings Bank, secured by a mortgage on residential property located in Montclair, New Jersey. In 2017, the Bank served the Gurveys with a notice of intent to foreclose. In response, the Gurveys filed an action in the Law Division challenging the bank's right to foreclose (the "Law Division Action"). In July 2018, the Bank filed a foreclosure action (the "Foreclosure Action"), in which the Gurveys asserted seventeen counterclaims, all of which were duplicative of claims asserted by the Gurveys in the Law Division Action. In June 2020, with both the Law Division and Foreclosure Actions pending, the Gurveys commenced a suit in federal court asserting the same seventeen claims as asserted in both the Law Division and Foreclosure Actions, as well as a single additional claim under New Jersey's Fair Foreclosure Act. The defendants moved to dismiss the action, arguing that the federal district court should abstain from considering the suit in view of the two pending state actions.

The federal district court, over the Gurveys' opposition, agreed, finding that well-settled federal law, set forth in *Colorado River Water Conservation Dist. v. United* States, 424 U.S. 800 (1976), permits a federal district court to abstain from hearing an action where parallel state court proceedings would result in disposition of the litigation. Here, applying the factors in *Colorado River*, the federal district court found abstention was appropriate, noting that the same claims were asserted against the same parties in pending state court actions.

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