

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LIMARCAR, L.L.C.,
Plaintiff,

v

Case No. 2015-149565-CB
Hon. Wendy Potts

FREE INVESTMENTS, L.L.C.,
Defendant.

**OPINION AND ORDER RE: DEFENDANT'S MOTION FOR RELIEF
FROM JUDGMENT PURSUANT TO MCR 2.612(B) AND (C)**

At a session of Court
Held in Pontiac, Michigan

On

SEP 20 2016

This matter is before the Court on Defendant's Motion for Relief from Judgment Pursuant to MCR 2.612(B) and (C). This Court has discretion to grant relief from judgment under certain circumstances. MCR 2.612(C)(1); *South Macomb Disposal Authority v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000).

By way of background, the parties entered into a Purchase Agreement¹ on March 11, 2015 for the sale of certain real property, namely 244 W. Bennett Ave., Ferndale, Michigan 48220. Thereafter, Defendant filed a Complaint to Quiet Title in order to clear title of the subject property. On account of the quiet title action, the parties initially agreed to extend the closing date from March 27, 2015 to May 15, 2015 and then subsequently agreed to a closing date of June 12, 2015. On July 14, 2015, Defendant quieted title to the property.

¹ See Defendant's Exhibit D.

Plaintiff initiated this lawsuit on October 12, 2015, by filing its Complaint for Specific Performance and Other Relief “once Defendant decided not to sell the property to Plaintiff.”² Based upon Plaintiff’s representation that service could not be reasonably made on Defendant, the Court entered an Order Regarding Alternate Service,³ which provided that service of the Summons and Complaint shall be effectuated by first-class mail to, and tacking to the door at, 4578 Webberdale Drive, Holly, Michigan 48442. Additionally, the Court ordered service by publication for a period of three weeks in The Oakland County Legal News.

When Defendant failed to answer or otherwise appear in this lawsuit, the Court granted a Default Judgment on March 30, 2016, wherein Plaintiff was awarded a money judgment in the amount of \$43,269.90, to be offset against the purchase price of the property at issue. Subsequent to the entry of the Default Judgment, the Court entered an Order Quieting Title to Real Property in Plaintiff’s favor on April 13, 2016. Thereafter, Defendant filed its Motion for Relief from Judgment Pursuant to MCR 2.612(B) and (C).

Defendant first seeks relief under MCR 2.612(B), which provides that “[a] defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.”

Regarding service, Defendant concedes that the Court entered an Order Regarding Alternate Service on December 28, 2016, which provided that service of the Summons and

² See Paragraph 9 in Defendant’s Motion for Relief from Judgment.

³ See Defendant’s Exhibit B. The Order Regarding Alternate Service was entered on December 28, 2015.

Complaint shall be made by first-class mail to, and tacking to the door at, 4578 Webberdale Drive, Holly, Michigan 48442. While Defendant admits that the Michigan Department of Licensing and Regulatory Affairs lists 4578 Webberdale Drive in Holly as its registered office address, Defendant maintains that the address is not up to date and as a result, Defendant never received actual notice of this action.

Defendant offers the Affidavit of Kathleen Love, a member of Defendant company, who states that neither she nor any other member received any notice of this lawsuit. Ms. Love asserts further that the address listed on the Department of Licensing and Regulatory Affairs website, namely 4578 Webberdale Dr., Holly, Michigan 48442, is an incorrect address and has not been updated. Notwithstanding Ms. Love's assertion, the 4578 Webberdale Drive continued to be the registered office address listed on the Department of Licensing and Regulatory Affairs website as of August 12, 2016, following the filing of Defendant's motion for relief from judgment. See Plaintiff's Exhibit 4.

Further, Defendant's 2015 and 2016 Limited Liability Company Annual Statements,⁴ filed with the Department of Licensing and Regulatory Affairs, designate the 4578 Webberdale address as the mailing address of the registered office. The Court observes that the 2016 Annual Statement was signed by Kathleen Love approximately one month after Plaintiff mailed the Summons and Complaint and tacked those documents to the door of that same address.

As Plaintiff points out in its Exhibit 9, Defendant had listed a different registered office address in its 2014 Limited Liability Company Annual Statement. With that in mind, the Court concludes that Defendant knowingly updated the registered office address to 4578 Webberdale Drive and has continued to utilize that address as the registered office address since 2015.

⁴ See Plaintiff's Exhibits 5 and 6.

Defendant's position that the address was not up to date is questionable in light of the filings with the Department of Licensing and Regulatory Affairs.

“The court rule governing the manner to serve process, MCR 2.105, describes various methods of service...The methods described in the rule ‘are intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances.’ MCR 2.105(J)(1). Compliance with the court rules fulfills the constitutional requirement of ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Bullington v Corbell*, 293 Mich App 549, 556; 809 NW2d 657 (2011).

In this matter, the Court finds that Plaintiff complied with the December 28, 2015 Order Regarding Alternate Service and the Michigan Court Rules to properly effectuate service⁵ of the Summons and Complaint in a “manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard.” *Lawrence M. Clarke, Inc. v Richco Const., Inc.*, 489 Mich 265, 274 (2011). At a minimum, Defendant received constructive notice of the lawsuit. What remains unclear is whether or not Defendant received actual notice⁶ of the action.

In conjunction with his argument under MCR 2.612(B), Defendant contends that relief from the Default Judgment should be granted pursuant to MCR 2.612(C)(1)(a), (b), (c), (e), and (f). Defendant relies on the Michigan Supreme Court's determination that “a defendant may satisfy the requirement of a ‘reason justifying relief from the judgment’ by showing that he or she (1) did not have actual notice of the action and (2) has a meritorious defense.” MCR 2.612(C)(1)(f); *Lawrence M. Clarke, Inc. v Richco Const., Inc.*, 489 Mich 265, 282; 803 NW2d 151 (2011). As noted previously, Defendant maintains that it did not have actual notice of the

⁵ See Plaintiff's Exhibits 7 and 8.

⁶ The Court defers to the definition of “actual notice” in Black's Law Dictionary, which is “[n]otice given directly to, or received personally by, a party.” *Black's Law Dictionary* (10th ed. 2014).

action and it has a meritorious defense regarding the alleged, unenforceability of the Purchase Agreement.

Assuming arguendo that Defendant's contention is true that it did not receive actual notice of the action, the Court shall next consider whether or not Defendant has a meritorious defense. Specifically, Defendant contends that the closing date for the sale of the property was extended until June 12, 2015, however, Defendant did not successfully quiet title to the property until July 15, 2015. Since the closing did not occur by June 12, 2015, Defendant argues that time was of the essence and as a consequence of the parties not meeting that deadline, the Purchase Agreement is unenforceable. In reference to the documents that extended the closing dates, Defendant relies on the proposition that "[a] new agreement extending the time of performance is evidence that the parties considered time as of the essence." *Nedelman v Meininger*, 24 Mich App 64, 74; 180 NW2d 37 (1970).

The Court of Appeals in *Nedelman* determined that "[i]n equity, time is generally not regarded as of the essence of a contract unless the contract so states; or it clearly appears that the parties intended time to be an essential element of their agreement; or unless, from the nature of the contract and surrounding circumstances, such intent must necessarily be implied. Where it is the clear intent of the parties to make time of the essence, the stipulation as to time must be observed, whether such be specified in terms of a particular hour or day." *Nedelman, supra*.

In the *Nedelman* case, the purchasers were required to complete the purchase within a set timeframe. In the event of default by the purchaser, the seller would then have the option to enforce the terms of the agreement or declare a forfeiture of the deposit. *Id.* at 67. Upon review of the subject Purchase Agreement in this matter, the Court observes that the initial closing date

was to occur on or before March 27, 2015. The closing date was extended twice.⁷ What is important to note here is that the two documents extending the closing date both include the proviso that all other terms and conditions will remain the same. The parties never altered the terms of the Purchase Agreement, nor did they incorporate a default provision should the closing not occur within a set timeframe. As such, the Court finds that the parties did not intend for time to be an essential element of their agreement where a party to the agreement could justifiably default the other based upon the closing date deadline.

With regard to Defendant's quiet title action, which necessitated the extended closing dates, Plaintiff argues that it never objected to the title or to any encumbrances on the property to warrant the quiet title action. In fact, Provision 17 of the Purchase Agreement provides that "Purchaser shall have 7 days to provide Seller with written notice of any objections to the condition of title. If Purchaser does not object within this timeframe, Purchaser shall be deemed to have waived any objections of the condition of title."⁸ Plaintiff represents that it never objected to the condition of the title and so the parties could have closed by June 12, 2015, but for Defendant's quiet title action. Plaintiff's arguments lend further support to the Court's finding that the parties' failure to close on the property by June 12, 2015 did not render the Purchase Agreement unenforceable, particularly since it was Defendant's quiet title action that required the extension of the closing date.

For all of these reasons, the Court finds that Defendant has not shown that it has a meritorious defense to justify relief from judgment under MCR 2.612(C)(1)(f). Moreover, Defendant has not presented any arguments or documentary evidence to support its position that relief from judgment is warranted under MCR 2.612(C)(1)(a), (b), (c), or (e). "A party may not

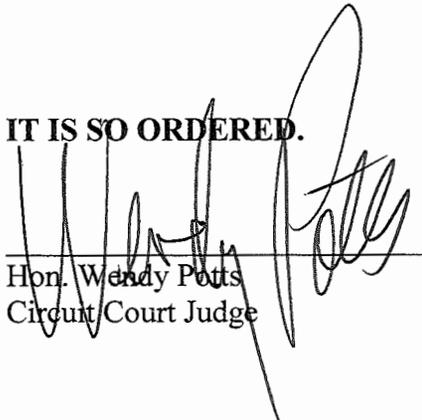
⁷ See Plaintiff's Exhibit 2.

⁸ See Plaintiff's Exhibit 1.

merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Accordingly, Defendant’s Motion for Relief from Judgment Pursuant to MCR 2.612(B) and (C) is hereby denied.

IT IS SO ORDERED.



Hon. Wendy Potts
Circuit Court Judge

Dated: **SEP 20 2016**