

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROSLYN PORTER,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 03-03768
	:	
v.	:	
	:	
NATIONSCREDIT CONSUMER	:	
DISCOUNT COMPANY, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

Stengel, J.

February 28 , 2007

After a two-day bench trial, the court entered a civil judgment in favor of the NationsCredit defendants on November 14, 2006, finding that the defendants did not violate federal or state law in obtaining a mortgage on plaintiff Roslyn Porter's home. See Porter v. Nationscredit Consumer Disc. Co., No. 03-3768, 2006 U.S. Dist. LEXIS 83161 (E.D. Pa. Nov. 14, 2006). On November 30, 2006, Porter filed a motion asking the court to amend its findings of fact and judgment. The court denied that motion. On January 30, 2007, Porter filed a motion to stay pending appeal to the Third Circuit under Rule 62(d); defendants oppose the motion. I will deny this motion because Porter cannot post a bond.

Porter's motion also brings up a completely new argument: that her personal liability was discharged through the earlier bankruptcy action. Although Porter plead

discharge in bankruptcy as an affirmative defense, she has now waived this defense by not proving it—or even litigating it—at trial.

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure Rule 62(d) provides that “[w]hen an appeal is taken the appellant by giving a supersedeas bond may obtain a stay.... The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.” Courts in the Third Circuit have held that district judges can exercise their discretion to grant a stay under Rule 62(d) without a bond in certain circumstances, although the Third Circuit has not spoken directly to this issue. Bank of Nova Scotia v. Pemberton, 964 F. Supp. 189, 192 (D.V.I. 1997).

II. DISCUSSION

A. Waiver of Supersedeas Bond

Posting a supersedeas bond preserves the status quo pending appeal and protects the prevailing party from possible loss resulting from the delay. Schreiber v. Kellogg, 839 F. Supp. 1157, 1159 (E.D. Pa. 1993). Porter requests that the court exercise its discretion to waive the bond requirement. Courts in the Third Circuit require that there be exceptional circumstances and an alternative means of securing the judgment creditor’s interest in order to waive the bond requirement. Bank of Nova Scotia, 964 F. Supp. at 192; Grand Entm’t Group v. Star Media Sales, No. 86-5763, 1992 U.S. Dist. LEXIS

7164, at *4 (E.D. Pa. 1992). The party seeking waiver of the bond must demonstrate that posting a full bond is impossible and must propose an alternative that will provide adequate security for the opposing party. Grand Entm't Group, 1992 U.S. Dist. LEXIS at *5.

In her reply brief, Porter includes a certification that she has no assets to secure a supersedeas bond other than her car, which has a lien on it. Pl's Reply Mem. Ex. A. Sandra Diguiulio, an underwriter for the Williard MacDonnell Agency, has certified that her agency would not issue a supersedeas bond in this case. Id. Ex. B. Ms. Diguiulio also stated that based on her industry experience, Porter would be unable to obtain a bond unless she had liquid assets of approximately \$550,000. Id. ¶ 7. While these facts demonstrate that Porter is unable to post bond, they do not necessarily demonstrate that the circumstances in this case are extraordinary. See HCB Contractors v. Rouse & Assocs., 168 F.R.D. 508, 513 (E.D. Pa. 1995) (finding extraordinary circumstances where the parties had presented "multifaceted and significant questions of both law and fact involving large sums of money" that clearly warranted appellate review).

Porter fails to propose a plan that provides adequate security. Instead, she suggests that the court should grant the stay because she will be irreparably harmed by losing her residence and that defendants will only suffer minimal economic harm by losing interest on the loan. Another district court found this argument unpersuasive, especially where the value of the property may not be sufficient to pay the judgment, because "[e]ven

large, financially secure parties have a legal right to collect judgments they have won....” Bank of Nova Scotia, 964 F. Supp. at 192. Even in the rare circumstances where courts have granted a stay, some alternative security arrangement is required. HCB Contractors v. Rouse & Assocs., 168 F.R.D. at 514 (approving a limited stay involving certain real property as security). In this case, Porter has not provided an appraisal of the property to show that the mortgage is sufficient to cover the judgement against her and accrued costs or suggested any alternative security arrangement. Porter fails to meet the standards required by Rule 62(d) in order to waive the bond requirement and the court cannot exercise its discretion and grant a stay.

B. Enforcement of Judge Fox’s Discharge Order¹

Porter moves for enforcement of the Honorable Bruce Fox’s discharge order, arguing that based on this order, she cannot be held personally liable and defendants cannot execute the judgement against her. See Pl’s Resp. Mem. Ex. C. for Judge Fox’s order, stating that Porter is entitled to a discharge under 11 U.S.C. § 1328 (a).²

Defendants argue that Porter waived the defense of personal discharge in bankruptcy, which is characterized as an affirmative defense under Federal Rule of Civil

¹ Porter does not state which, if any, federal rule of civil procedure rule supports her motion to enforce the discharge injunction at this late stage in the litigation. Porter also failed to argue this issue in her first post trial motion.

² This order appears to be a standard form and merely states that Porter is entitled to a discharge after completion of the chapter 13 plan. Defendants also argue that the discharge order is not controlling because Porter’s own Chapter 13 plan, handwritten by her attorney Mary Jeffery, dictates that the claims of NationsCredit will be determined in this litigation and not governed by the Chapter 13 plan. Defs’ Resp. Ex. A. The court will not reach the merits of this argument because Porter has waived this affirmative defense.

Procedure 8(c), by failing to prove the defense at trial. Porter responds that she raised the discharge issue “repeatedly” in the litigation. Porter included the discharge as an affirmative defense in the answer to defendants’ counterclaim. Pl’s Resp. Mem. Ex. C. Porter also admitted the discharge order into evidence during the trial. Aside from these two written submissions, Porter argues this defense for the first time in her second post-trial motion.

Porter had the burden of establishing her affirmative defense at trial. While Porter may have submitted the discharge order at trial, she did not argue that this order absolved her of personal liability. The Third Circuit has held that a party waives an affirmative defense when it does not attempt to establish the defense before or at trial and that merely raising the defense in an answer is insufficient to avoid waiver. Bradford-White Corp. v. Ernst & Whinney, 872 F.2d 1153, 1161 (3d Cir. 1989); see also Williams v. Runyon, 130 F.3d 568, 574 (3d Cir. 1997). The rationale behind this rule is that it would be “grossly unfair to allow a [party] to go to the expense of trying a case only to be met by a new defense after trial.” 872 F.2d at 1161. This rule applies here. Porter cannot be permitted in her second post-trial motion to raise an issue that was not litigated at trial.

III. CONCLUSION

For the reasons stated above, plaintiff’s motion is denied. An appropriate order follows.

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	:	
Defendants.	:	

ORDER

AND NOW, this 28th day of February, 2007, upon consideration of plaintiff's motion to stay pending appeal (Document No. 199) and the responses thereto, it is hereby **ORDERED** that plaintiff's motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.