

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

THOMAS LEE TAYLOR and : CIVIL ACTION  
PATRICIA ANN TAYLOR :  
 :  
v. :  
 :  
CHEVROLET MOTOR DIVISION OF :  
THE GENERAL MOTORS CORPORATION : NO. 97-2988

MEMORANDUM ORDER

By order of June 3, 1998, the court denied defendant's motion to vacate the judgment entered in this case pursuant to Fed. R. Civ. P. 68. That motion was predicated on Fed. R. Civ. P. 60(b)(3), (5) and (6). Defendant has now filed a motion for reconsideration of that order and a new motion to vacate predicated on Rule 60(b)(1).<sup>1</sup>

To support its motion for reconsideration, defendant essentially rehashes the arguments presented in support of the initial motion to vacate and adds three assertions. The court will not reiterate what is set forth in its memorandum of June 3, 1998, but will briefly address the three additional assertions.

---

<sup>1</sup> Rule 60(b)(1) and Rule 60(b)(6) are mutually exclusive as relief under Rule 60(b)(6) is unavailable for any reason encompassed by subsections (1)-(5). See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863 & n.11 (1988); United States v. Real Property & Residence, 920 F.2d 788, 791 (11th Cir. 1991); Endicott Johnson Corp. v. Liberty Mut. Ins. Co., 986 F. supp. 120, 122 (N.D.N.Y. 1997); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2864, at 362. The court has assumed that defendant's various arguments were made alternatively and considered each referenced subsection in its review of the record presented.

Defendant now contends that there was no valid offer and acceptance because there was no "meeting of the minds." In fact, it is abundantly clear that all parties intended that judgment would be entered for \$27,498.22. Unlike cases relied upon by defendant, this was not a case where a Rule 68 offeree had judgment entered in an amount unspecified by or clearly unintended by the offeror. Rather, because defendant never accounted in its offer for the payment to the lienholder, there was no meeting of the minds and thus no agreement regarding any right to credit that payment against the agreed upon amount of the judgment. This is not a basis for vacating a Rule 68 judgment entered in the amount specified and intended by the parties.

Defendant now recasts its argument that a right to a credit for the pre-litigation payment to the lienholder was implicit in the Rule 68 offer. Defendant asks that such a term be inferred from a "course of dealing" between counsel for the parties in earlier cases involving different claimants. That "course of dealing" is said to be a series of settlement agreements between other clients of plaintiffs' counsel and defendant in which payments to lienholders were specifically accounted for and no sum was included for punitive damages.

There is no suggestion of any course of dealing between the parties in this case. Thus, presumably the Rule 68 offer

could have been taken on its face by plaintiffs if they had different counsel.<sup>2</sup> Even assuming one could fairly impute to the clients their attorney's "course of dealing" in other cases involving other clients, no evidence has been proffered of any prior Rule 68 offer by defendant to any client of plaintiffs' counsel which was perceived implicitly to incorporate an unspecified credit for a payment to a lienholder or other expenditure.

Plaintiffs' counsel's representation that there was no prior communication regarding the terms or phrasing of an offer of judgment is uncontroverted. Plaintiffs were not required to assume that because defendant had declined to make prior settlement offers which included an amount for potential punitive damages, it could not be offering any such amount in their case. Similarly, defendant cannot rely on the terms of a prior pre-litigation settlement offer which did not result in a binding agreement to contradict or to preclude reliance on the plain terms of a subsequent post-litigation settlement offer, let alone Rule 68 offer of judgment.

Finally, defendant seeks to buttress its contention that plaintiffs are engaging in "an attempt to defraud" with a

---

<sup>2</sup> Defendant's characterization of counsel as plaintiffs in the caption of its motion and brief, presumably because they would receive \$750 in legal fees, does not make them parties.

quote from an unpublished Third Circuit opinion in Hilferty v. Chevrolet Motor Div. of General Motors Corp., No. 96-1540 (3d Cir. May 5, 1997), involving an unrelated dispute over fees earned by plaintiffs' law firm. The Court in that case admonished counsel for "incivility" and "disrespect" toward the district judge who ruled on the fee petition, and questioned counsel's veracity regarding a billing explanation. These observations were made from "evidence in the record." Insofar as defendant suggests from this unpublished opinion that plaintiffs' counsel are generally reprehensible and unworthy of belief, it is defendant who is using a questionable tactic. The court's decision was not based on any representation of plaintiffs' counsel disputed by defendant, but rather on the face of the record as presented by defendant. Neither plaintiffs nor their counsel acted fraudulently or improperly in accepting an unequivocal Rule 68 offer to enter judgment for \$27,487.22 and in not reading the offer to state \$10,770.45.

Defendant's new Rule 60(b)(1) motion is premised on its counsel's "excusable neglect" in drafting the Rule 68 offer without excluding or specifying a credit for the amount of the prior payment to the lienholder.<sup>3</sup> Counsel, by their own acknowledgment, routinely accounted for such payments in

---

<sup>3</sup> Defendant does not explain why this ground was unknowable when it filed its initial Rule 60(b) motion. "A [Rule 60(b)(1)] motion is not timely merely because it has been filed within one year of the judgment." White v. American Airlines, Inc., 915 F.2d 1414, 1425 (10th Cir. 1990). Rather, it must also be filed within a reasonable time after the basis for relief is or should be known. Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 610 (7th Cir. 1986); 12 James Wm. Moore et al., Moore's Federal Practice § 60.65[1] (3d ed. 1998).

settlement offers when that was their intent. It was not excusable to forget or fail to include any such term when making a formal written Rule 68 offer of judgment. If there is any occasion in civil litigation which calls for caution and care by counsel, it is the drafting of a Rule 68 offer. See Chambers v. Manning, 169 F.R.D. 5, 8 (D. Conn. 1996). See also 12 Charles Allan Wright et al, Federal Practice and Procedure § 3005.2 (1997) ("in all but the most extraordinary circumstances mistakes should not affect" Rule 68 judgments).

**ACCORDINGLY**, this                    day of June, 1998, **IT IS**  
**HEREBY ORDERED** that defendant's Motion for Reconsideration of its Rule 60(b) motion and new Motion Pursuant to Rule 60(b)(1) are **DENIED**.

**BY THE COURT:**

---

**JAY C. WALDMAN, J.**