

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

THE PRUDENTIAL INSURANCE CO. : CIVIL ACTION
OF AMERICA :
 :
v. :
 :
RAMAD 34 and D. CAPPONI AND :
SONS, INC. : NO. 94-3386

M E M O R A N D U M

Ludwig, J.

July 7, 1999

Defendants Ramad 34 and D. Capponi & Sons, Inc. move for supplementary relief in the form of liquidated damages under 42 Pa. Cons. Stat. Ann. § 8104 (West 1996).¹ Jurisdiction is diversity. 28 U.S.C. § 1332.

In June 1994 Prudential Insurance Company of America confessed judgment against defendants on a defaulted mortgage note and guarantee. Both defendants were Pennsylvania corporations – Ramad 34, the mortgagor, and D. Capponi & Sons, the guarantor. A settlement agreement dated March 1, 1996 provided that an apartment house, located in Philadelphia and owned by Ramad 34 would be sold at “sheriff’s” sale² to pay off the judgment – Prudential to mark

¹While Prudential’s response to Ramad 34’s motion was timely, its response to D. Capponi & Sons, Inc.’s motion was several weeks late. Local Rule of Civil Procedure 7.1(c) (response required within fourteen days of service). Given the close similarity between the two motions, plaintiff’s belated response will also be considered. Cf. Avellino v. Herron, 181 F.R.D. 294, 295 n.4 (E.D. Pa. 1998) (“In light of the important issues raised by defendant’s motion, the Court will consider the merits of the defendant’s motion, rather than grant the motion as uncontested.”).

²An execution sale on a federal court judgment is conducted by the U.S. Marshall, not by a sheriff. See Fed. R. Civ. P. 69; Yazoo & Miss. Valley R.R. Co. v. City of Clarksdale, 257 (continued...)

the judgment satisfied after the sale occurred. Settlement agreement ¶¶ 16, 20, 25. On March 12, 1996 Prudential assigned the note and judgment to Rampar Associates,³ which instituted a separate state court action against defendants. On December 2, 1996 the property was bought by Rampar at the execution sale held on the judgment obtained in that action. The judgment in this court was not marked satisfied at that time. Two years later, on December 2, 1998 the instant motions were filed. Rampar and Prudential thereupon requested our Clerk of Court to have the within judgment marked satisfied.

Movants contend that each of them is entitled to liquidated damages of \$478,461.79 – or \$956,923.58 in all – under the Pennsylvania statute in effect when the judgment was confessed in favor of Prudential in this court. Pa. Cons. Stat. Ann. § 8104 (original version). The following defenses are asserted: (1) the motions are governed by the 1997 amendment to § 8104 – which requires willfulness and limits damages to \$2,500; (2) upon assignment of the judgment, plaintiff had no right or obligation to have it marked satisfied; (3) plaintiff was not given a written demand to mark the judgment satisfied; (4) the property was sold in execution on a separate judgment in state court; (5) the obligation

²(...continued)
U.S. 10, 24-25, 42 S.Ct. 27, 31, 66 L.Ed. 104 (1921). The settlement agreement speaks of a sheriff's sale but does not mention the filing of a state court action. At the time of the agreement, the sole judgment was the one of record in this court.

³A partnership of Jose Ramos and John Parsons.

underlying the judgment in this action has not been satisfied; (6) defendants did not enter into the settlement stipulation in good faith; (7) the motion is barred by laches and is untimely under Fed. R. Civ. P. 60(b); and (8) assessing the requested damages would violate plaintiff's procedural and substantive due process rights.

It is correct that the subject of the parties' settlement agreement was the judgment entered in this court and not the judgment taken in the state court action in which plaintiff was not a party. Because plaintiff does not appear to have had notice of the execution sale conducted in state court, it is unnecessary to rule on plaintiff's other arguments.

The controlling substantive statute is 42 Pa. Cons. Stat. Ann. § 8104. When a matter of state law has not been definitively declared, it becomes necessary to "predict what the [state's highest court] would do if presented with this case. . . . In the absence of [such] guidance, . . . we are to consider decisions of the state's intermediate appellate courts for assistance in predicting how the state's highest court would rule." 2-J Corp. v. Tice, 126 F.3d 539, 541 (3d Cir. 1997) (citations omitted).

Under 42 Pa. Cons. Stat. Ann. § 8104, originally enacted in 1976, a judgment debtor could recover liquidated damages from a judgment creditor who, after a written request, does not mark the judgment satisfied. In 1996, when the parties entered into their settlement agreement, that statute read:

§ 8104. Duty of judgment creditor to enter satisfaction

(a) General Rule.—A judgment creditor who has received satisfaction of any judgment in any tribunal of this Commonwealth shall, at the written request of the judgment debtor, or of anyone interested therein, and tender of the fee or entry of satisfaction, enter satisfaction in the office of the clerk of the court where such judgment is outstanding, which satisfaction shall forever discharge the judgment.

(b) Liquidated damages.—A judgment creditor who fail or refuse for more than 30 days after written notice in the manner prescribed by general rules to comply with a request pursuant to subsection (a) shall pay to the judgment debtor as liquidated damages 1% of the original amount of the judgment for each day of delinquency beyond such 30 days, but not less than \$250.00 nor more than 50% of the original amount of the judgment. Such liquidated damages shall be recoverable pursuant to general rules, by supplementary proceedings in the matter in which the judgment was entered.

42 Pa. Cons. Stat. Ann. § 8104 (West 1996).⁴

The settlement agreement states that "Prudential hereby agrees to mark all judgments against the Defendants satisfied after the sheriff's sale of the Property." Settlement agreement ¶ 25. Except perhaps by implication — from the use of the term "sheriff's sale" — there is no reference to a foreclosure action in state court, and movants do not contend that one was contemplated. At that time, the judgment of record in this court was the only real estate lien in existence, *i.e.*, the sole basis for an execution sale of the property.

⁴The reference to "any tribunal of this Commonwealth" has been held, in an analogous setting, to include this court. See Allstate Ins. Co. v. Gammon, 838 F.3d 73, 77 (3d Cir. 1988).

Ordinarily, a settlement agreement referable to satisfaction of a particular judgment will qualify as written notice under the Pennsylvania statute. See O'Donoghue v. Laurel Sav. Ass'n, ___ Pa. ___, ___, 728 A.2d 914, 918 (1999) ("When interpreting the request requirement of 42 Pa.C.S. § 8104, this Court has held that an agreement that another will perform a certain action will constitute a request." (citing Woodstown Constr., Inc. v. Clarke, 362 Pa. Super. 119, 523 A.2d 804, rev'd on other grounds, 516 Pa. 519, 533 A.2d 708 (1987))). However, such notice can become effective only when the terms and conditions of the agreement have been performed by or on behalf of the judgment debtor. Here, the agreement clearly required plaintiff to have "all judgments against defendants" marked satisfied. But it is unclear that there would be a separate foreclosure action and that plaintiff would not be given notice of it or of the occurrence of the execution sale in state court. No claim is made that plaintiff had such notice. Under Woodstown, as discussed by the Pennsylvania Supreme Court in O'Donoghue, the executing judgment creditor as a party to the settlement agreement was deemed to have written notice of the statutory obligation to satisfy the judgment in question upon the occurrence of a specific condition – in that instance, the payment to the judgment creditor of the settlement amount. That critical piece, the occurrence of the specific condition, is missing in this case. Moreover, there is no contention or reason to believe that if plaintiff had been given notice of the state

foreclosure sale, it would not have had the judgment in this court marked satisfied.

The potential harshness of the liquidated damages provision of the original statute was recognized by the Pennsylvania Assembly in 1997, not long after the execution sale was held and before the present motion were filed. While retroactivity of the amendment – capping the damages at \$2,500 and explicitly requiring willfulness – will not be ruled on here, this legislative expression strongly suggests that the amendment's predecessor should be regarded as penal in nature. The amounts presently sought by movants reinforce that view.⁵ In enforcing a law of this type in favor of a private claimant, a showing must be made of unequivocal entitlement. See United States v. Frame, 885 F.2d 1119, 1142 (3d Cir. 1989) (“The law is settled that penal statutes are to be construed strictly, and that one is not to be subject to a penalty unless the words of the statute plainly impose it.” (quoting Commissioner v. Acker, 361 U.S. 87, 91, 80 S.Ct. 144, 147, 4 L.Ed.2d 127 (1959))). If anything, the uncertain language of the settlement agreement portended foreclosure on the existing

⁵According to movants, each one of them is entitled to the full amount of liquidated damages under § 8104. This result is doubtful even if the statute were applied in their favor. See First Nat'l Bank of Palmerton v. McLain, Nos. 1994-J-3499, 1994-C-7585, 1994-C-3472, slip op. at 24 n.6 (Ct. C.P. Northampton Co. Apr. 3, 1998) (“[A] single penalty with respect to a single debt is appropriate”). But see First Seneca Bank v. Sunseri, 24 Pa. D. & C.4th 43 (Ct. C.P. Allegh. Co. 1995), aff'd, 449 Pa. Super. 566, 674 A.2d 1080 (1996) (each defendant entitled to receive the full statutory award).

judgment in this court. It can not be said that the agreement itself constituted "the written request of the judgment debtor," as required by the act.

Accordingly, defendants' motions for supplemental relief in the form of liquidated damages will be denied.

Edmund V. Ludwig, J.

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O R D E R

AND NOW, this 7th day of July, 1999, the motions of defendants Ramad 34 and D. Capponi & Sons, Inc. for supplementary relief in the form of liquidated damages (docket nos. 38, 39) are denied. Accordingly, the motion of Prudential Insurance Company of America to substitute Rampar Associates as party plaintiff nunc pro tunc (docket no. 44) is moot.

Edmund V. Ludwig, J.