

The Delaware Supreme Court recently affirmed a Superior Court order vacating a sheriff's deed and setting aside a sheriff's sale on a mortgage foreclosure action. The Court found that, while the mortgage lender gave adequate notice of the sheriff sale and made attempts to comply with the legal notice requirements, the borrower, a physically and mentally disabled woman, was "incompetent" at the time that notice was given. Thus, the notice was insufficient because the borrower was unable to defend the action. The Court relied upon the exception for what qualifies as adequate notice for an incompetent mortgagor as described by the United States Supreme Court in *Covey v. Town of Somers*, 351 U.S. 141 (1956). The United States Supreme Court has previously held that statutory constructive notice is insufficient notice for someone who is incompetent and that "a taking under such circumstances would be without due process of law." *Covey* at 146-47.

The Court has ruled that even constructive notice of a mortgage action that complies with the relevant notice statute would be ineffective as to an incompetent borrower. The one issue not resolved by the Court is how a lender can give notice of a mortgage action to an incompetent borrower as such borrower or his or her guardian could argue that even actual notice would be insufficient if not understood by the borrower.

See below for the Court's opinion.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEUTSCHE BANK NATIONAL	§	
TRUST COMPANY, as Trustee	§	No. 506, 2012
for MORGAN STANLEY ABS	§	
CAPITAL I INC. TRUST 2005-HE2,	§	
	§	
Plaintiff Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
NANCY GOLDFEDER c/o	§	
EMIL MIKHAIL, Guardian Ad Litem,	§	No. 08L-10-197
	§	
Defendant Below-	§	
Appellee.	§	

Submitted: January 9, 2014
Decided: February 14, 2014

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

On this 14th day of February 2014, it appears to the Court that:

(1) Plaintiff-Below/Appellant Deutsche Bank National Trust Company (“Deutsche Bank”) appeals a Superior Court order granting Defendant-Below/Appellee Nancy Goldfeder’s Petition to Vacate the Sheriff’s Deed, Vacate Confirmation, and Set Aside the Sheriff’s Sale in an *In Rem Scire Facias Sur* mortgage action. Deutsche Bank raises three claims on appeal. Deutsche Bank contends that the Superior Court erred: (1) by vacating the sale without finding that Deutsche Bank committed a defect or error in notice of the foreclosure sale, (2) by

granting Goldfeder's motion even though it was presented after confirmation without any excusable delay, and (3) for considering whether there was prejudice to Deutsche Bank. We find no merit to Deutsche Bank's appeal. Accordingly, we affirm.

(2) Goldfeder is incompetent. She suffers from HIV/AIDS, alcoholism, severe bouts of diarrhea, extreme weight loss, and a score of 25 on the Global Assessment of Functioning scale.¹ Goldfeder cannot handle the responsibilities of home ownership, personal finance, or even basic self-care. Dr. Emil Mikhail, a non-native English speaker, first began treating Goldfeder around 2001. Goldfeder presented multiple difficulties, and Dr. Mikhail diagnosed her with HIV, among other things. Ten months later, Dr. Mikhail saw Goldfeder walking in traffic, appearing disheveled and homeless. He took her to the emergency room where he learned that Goldfeder's condition had progressed to AIDS. Dr. Mikhail also learned that Goldfeder's residence on Union Street was condemned by the City in 2007. He offered her space in the basement of his residence, where she lived from 2007 until 2011. Dr. Mikhail also paid certain of Goldfeder's expenses, including helping Goldfeder's father with her mortgage.

(3) Goldfeder had entered into her mortgage with MERS as nominee for Home Funds Direct in 2004. The mortgage was secured by the property located on

¹ According to the DSM-IV, a GAF score of 21-30 reflects an "inability to function in almost all areas." *See* Def.'s Ex. 2, at 7 n.1.

North Union Street in Wilmington. The mortgage was later assigned to Deutsche Bank. In 2007, Goldfeder defaulted on that mortgage. Deutsche Bank filed an *In Rem Scire Facias Sur* mortgage action against her in 2008. Goldfeder failed to appear or file a pleading in the matter. Deutsche Bank obtained a default judgment on April 13, 2010. A writ of *levari facias* was issued, and a sheriff's sale was held in November 2011. Deutsche Bank was the highest bidder at sale. The sale was confirmed on December 23, 2011, and the sheriff deeded the property to Deutsche Bank on January 25, 2012.

(4) Dr. Mikhail became aware of the sheriff's sale in January 2012. He took Goldfeder to the Department of Justice to file a complaint that a bank was trying to improperly take possession of the North Union Street property. Not long thereafter, Dr. Mikhail contacted an attorney to inquire whether Goldfeder had any recourse after the sheriff's sale out of the belief that Goldfeder was a victim of predatory lending. The attorney advised Dr. Mikhail that Goldfeder was likely without recourse against Deutsche Bank. Upon learning that the Attorney General was not pursuing the matter, Dr. Mikhail subsequently took a different course of action. He sought Guardian Ad Litem status for Goldfeder in order to void the sale. On July 27, 2012, the Superior Court found Goldfeder to be incompetent on matters relating to the Sheriff's Sale and granted the Dr. Mikhail Guardian Ad Litem status.

(5) On August 8, 2012, Goldfeder, through her guardian Dr. Mikhail, filed a Motion to Vacate Sheriff's Sale, Vacate Confirmation, and Set Aside Sheriff's Sale for, *inter alia*, failure to provide adequate notice under Superior Court Rule 69(g). After oral argument, the trial court granted the motion, citing Goldfeder's incompetence and lack of prejudice to Deutsche Bank. An appeal followed. After hearing oral arguments, we retained jurisdiction under Supreme Court Rule 19(c) and remanded this matter to the Superior Court to determine the factual basis for granting Goldfeder's motion.² After supplemental briefings and a hearing, the Superior Court found that Goldfeder was given adequate constructive notice.³ But the trial court found that she was incompetent at the time of this notice, which caused her to delay seeking relief.⁴ Additionally, the Superior Court found that Dr. Mikhail's delay in seeking redress on behalf of Goldfeder was excusable.⁵ Finally, the court held that in exercising its discretion, the Court could permissibly consider the lack of prejudice to Deutsche Bank in granting Goldfeder's motion.⁶ The matter was then returned to this Court.

(6) "This Court applies a deferential standard of review to the Superior Court's determination to deny a motion to set aside a sheriff's sale and such a

² *Deutsche Bank v. Goldfeder*, No. 506, 2012 (Del. May 10, 2013).

³ *Deutsche Bank v. Goldfeder*, C.A. No.: 08L-10-197 CEB, slip op. at 1 (Del. Super. Ct. Nov. 12, 2013).

⁴ *Id.* at 3.

⁵ *Id.* at 8.

⁶ *Id.* at 10.

determination will be set aside only in a case of abuse of discretion.”⁷ “To find an abuse of discretion, there must be a showing that the trial court acted in an arbitrary and capricious manner.”⁸ But when the trial court “has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.”⁹ Although “the court’s discretion is broad, it is not unlimited.”¹⁰ A court may not arbitrarily or capriciously refuse to confirm a sale where there are no irregularities in the sale proceedings or where there is no fraud, unfairness, or other extraneous matter demonstrating unfairness to one of the interested parties.¹¹

(7) Deutsche Bank first argues that the Superior Court’s authority to set aside a sheriff’s sale is limited to procedural defects. Because no procedural defects were found, Deutsche Bank contends that reversal is required. Under Superior Court Civil Rule 69(g), a mortgagee demonstrates adequate notice by showing that the mortgagor had actual or constructive knowledge of a sheriff’s

⁷ *Fitzsimmons v. New Castle Cnty.*, 827 A.2d 30, 2003 WL 21556987, at *1 (Del. 2003) (citing *Deibler v. Atl. Props. Grp., Inc.*, 652 A.2d 553, 558–59 (Del. 1995)).

⁸ *Spencer v. Wal-Mart Stores E., LP*, 930 A.2d 881, 887 (Del. 2007) (citing *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968)).

⁹ *Deibler*, 652 A.2d at 558–59 (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

¹⁰ *Option One Mortg. Corp. v. Diamicis*, 2007 WL 441943, at *2 (Del. Super. Ct. Feb. 9, 2007) (citing *Burge v. Fid. Bond & Mortg. Co.*, 648 A.2d 414, 420 (Del. 1994)).

¹¹ *Greenpoint Mortg. Funding, Inc. v. McCabe*, 2006 WL 3604784, at *1 (Del. Super. Ct. Nov. 27, 2006), *aff’d sub nom. Pac. W. Grp., Inc. v. Greenpoint Mortg. Funding, Inc.*, 933 A.2d 1250 (Del. 2007).

sale.¹² Actual knowledge is defined as “direct and clear knowledge.”¹³ Constructive knowledge is defined as “knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.”¹⁴

(8) The United States Supreme Court has carved out an exception for what qualifies as adequate notice for an incompetent mortgagor. In *Covey v. Town of Somers*,¹⁵ the Supreme Court held that statutory constructive notice is insufficient notice for someone who is incompetent and that “a taking under such circumstances would be without due process of law.”¹⁶ In *Covey*, the debtor received notice by mail, posting, and publication in two local newspapers.¹⁷ But the debtor failed to appear in court or file an answer, resulting in a default judgment.¹⁸ After the default judgment, the debtor was declared incompetent and a guardian was appointed.¹⁹ The creditor sold the property to satisfy the debt, but the guardian moved to re-litigate the default judgment, vacate the deed, and set aside the sale.²⁰ The guardian argued that even though there was technical “compliance

¹² Sup. Ct. Civ. Rule 69(g).

¹³ Black’s Law Dictionary 950 (9th ed. 2009).

¹⁴ *Id.*

¹⁵ 351 U.S. 141 (1956).

¹⁶ *Covey*, 351 U.S. at 146–47.

¹⁷ *Id.* at 144.

¹⁸ *Id.*

¹⁹ *Id.* at 145.

²⁰ *Id.*

with the statute,” the statute as applied violated the Fourteenth Amendment.²¹ The creditor argued “that the Fourteenth Amendment does not require [an entity] to take measures in giving notice to an incompetent beyond those deemed sufficient” by statute.²² The Supreme Court disagreed and held that such statutory constructive notice is insufficient and violates due process where the homeowner is known to be incompetent and without protection of a guardian.²³

(9) In this case, the trial court found that Goldfeder was given adequate constructive notice under the Rule 69(g) when Deutsche Bank, in good faith, provided notices and made attempts to comply with the legal requirements of the sheriff’s sale. The court also found Goldfeder to be incompetent at the time of the notices. Despite Deutsche Bank having given adequate constructive notice in accordance with Superior Court Civil Rule 69(g), Goldfeder was incompetent at the time and could not defend the action. Thus, Deutsche Bank’s notice was insufficient. As a result, the trial court did not defy reason or established law when it granted Goldfeder’s petition and accordingly did not abuse its discretion.

(10) Deutsche Bank’s second claim on appeal is that Goldfeder’s motion is time barred because it was presented after confirmation of the sale without any

²¹ *Id.*

²² *Id.* at 146.

²³ *Id.* at 146–47.

excusable delay. Superior Court Civil Rule 69(d), which governs confirmation, provides:

Return of sheriff's sales of real estate shall be made on the third Monday of the month succeeding the date of the sale and applications to set aside such sales shall be made on or before the first Thursday succeeding said return date, and all such sales not objected to on or before the first Thursday, shall on the first Friday, be confirmed as a matter of course.²⁴

(11) When interpreting Rule 69(d), this Court has previously stated that “[o]bjections to the process by which property is sold on execution are waived if the objector fails to file a timely application to set the sale aside, unless the court finds lack of notice or other basis to relieve the party of the consequences of unexcused delay.”²⁵ We have also held that “[b]ecause of the strong public interest in the finality of sheriff's sales, a presumption of unreasonable delay and lack of diligence arises after the sale is confirmed by the court.”²⁶ As a result, “subsequent objections are untimely ‘unless the court finds lack of notice or other basis to relieve the party of the consequences of unexcused delay.’”²⁷ Therefore, it “has long been recognized that objections to a sheriff's sale are waived as untimely if not asserted prior to confirmation.”²⁸ But this rule is not absolute because “the

²⁴ Super. Ct. Civ. R. 69(d).

²⁵ *Deibler*, 652 A.2d at 556; *see also Swiggett v. Kollock*, 3 Houst. 326, 332 (Del. Sup. Ct. 1866) (holding that “it is a rule of this court, that no objection [sic] to the inquisition can be taken after the return term of the *fi. fa.* and inquisition, except in the special case of want of notice”).

²⁶ *Shiple v. New Castle Cnty.*, 975 A.2d 764, 770 (Del. 2009).

²⁷ *Id.* (quoting *Deibler*, 652 A.2d at 556).

²⁸ *Id.*

Superior Court has broad power to control such sales to correct abuses or protect parties from injustice.”²⁹

(12) Here, the Superior Court did not abuse its discretion when it excused Goldfeder’s delay. The court found that Goldfeder’s incompetence was—in whole or in part—the cause for the delay and that the delay was excusable. Further, the fact that Dr. Mikhail was aware of Goldfeder’s medical condition and involved in helping her avoid default does not negate Goldfeder’s excusable delay. The confirmation of sale occurred on December 28, 2011. But Dr. Mikhail first became aware of the sale in January 2012. Additionally, the Superior Court found that Dr. Mikhail acted with due diligence thereafter. Dr. Mikhail took immediate action once he was aware of the sale. He helped Goldfeder file a complaint with the Department of Justice. Despite the unusual relationship between Goldfeder and Dr. Mikhail, Dr. Mikhail was under no duty to act on Goldfeder’s behalf. Indeed, he was not legally capable of so acting until he was granted Guardian Ad Litem status in August 2012. Because there was no legal relationship or actual knowledge of the sheriff’s sale on Dr. Mikhail’s part, his delay in filing was excusable.

²⁹ *Id.*; *see also* Sup. Ct. Civ. R. 60(b)(6) (“On motion and upon such terms as are just, the Court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for . . . [any] reason justifying relief from the operation of the judgment.”).

(13) Deutsche Bank argues that because Dr. Mikhail made mortgage payments on Goldfeder's behalf before the default, he had actual knowledge of a mortgage before January 2012, making his delay inexcusable. This argument also lacks merit. The trial court found Dr. Mikhail to be a credible witness, but linguistically and legally unsophisticated. The court also found that Dr. Mikhail did not know he was paying Goldfeder's mortgage on the property or that he was aware of the sale until January 2012. Those are factual findings that this Court will not disturb on appeal. Accordingly, the Superior Court did not abuse its discretion in concluding that neither Goldfeder nor Dr. Mikhail had sufficient notice of the sale, thereby excusing Dr. Mikhail's delay in filing a timely application to set aside the sale.

(14) Deutsche Bank's third claim is that the Superior Court erred when it considered the lack of prejudice to Deutsche Bank in granting Goldfeder's motion. The Superior Court's broad discretion allows it to consider a myriad of factors in ruling on a motion to vacate.³⁰ There is no Delaware case law that considers a mortgagee's lack of prejudice to be a sufficient basis to set aside a sheriff's sale. Likewise, Deutsche Bank does not present any authority suggesting that the Superior Court cannot consider a party's prejudice when deciding a motion to vacate confirmation.

³⁰ *Diamicis*, 2007 WL 441943, at *2 (citing *Burge*, 648 A.2d at 419).

(15) In this case, the court's consideration of Deutsche Bank's potential prejudice was not an abuse of discretion. Rather, the trial court considered equity and practicality in its ruling. Deutsche Bank had not sold the property to a third party or undertaken substantial expenses in rehabilitating the property.³¹ The trial court only considered whether the parties could be restored to the *status quo ante* without undue hardship. Although there has been delay and Deutsche Bank has incurred legal costs, these circumstances do not compel a different result.³² Because the court acted within the bounds of reason in view of all of the circumstances and did not ignore any recognized rule of law, its equitable and practical consideration of Deutsche Bank's lack of prejudice will not be disturbed.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

³¹ The property was condemned by the City in 2007, and it continued to remain in a state of serious disrepair thereafter.

³² Cf. *Old Guard Ins. Co. v. Jimmy's Grille, Inc.*, 860 A.2d 811, 2004 WL 2154286, at *3 (Del. 2004) (noting that "no prejudice to Old Guard was shown, other than the fact that Old Guard would be required to answer the motion and then defend on its merits, despite its belief the case had already been resolved"); *Justice v. McGinn*, 1998 WL 229436, at *4 (Del. Ch. Apr. 21, 1998) (explaining that the fact that the petitioners obtained a new deed and survey for their property following a default judgment does not amount to "substantial prejudice"); *Pinkett v. Valley Forge Ins. Co.*, 1989 WL 135750, at *4 (Del. Super. Ct. Oct. 4, 1989) (finding no prejudice to the plaintiff in granting a defendant's motion to vacate a default judgment, forcing the parties to relitigate).