



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL A. ZIMMERMAN,	)	
CONNIE JO ZIMMERMAN,	)	
BBC PROPERTIES, INC., and	)	No. 668,2013
GOVERNORS CLUB	)	
PROFESSIONAL CENTER, LLC,	)	
	)	
Defendants Below, Appellants,	)	Court Below – Superior
	)	Court of the State of
v.	)	Delaware in and for
	)	Kent County, Case No.:
	)	K13J-00649
CUSTOMERS BANK, formerly	)	
known as New Century Bank,	)	
	)	
Plaintiff Below, Appellee.	)	

APPELLANTS' REPLY BRIEF ON APPEAL

AVENUE LAW

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DATED: March 31, 2014

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## **SUMMARY OF ARGUMENT**

1. Although Appellants' believe that the procedural and statutory issues forming the basis of this appeal have been fully briefed in the parties' opening and answering briefs, Appellants hereby reply to simply disagree with the fact asserted by Appellee that no notice was given that Michael A. Zimmerman and Connie J. Zimmerman were, in fact, residents of the State of Florida at all applicable times. Further, Appellants' assert that lack of formal notice, although such shortfall does not exist, does not excuse Appellee's failure to comply with procedural and statutory mandates governing entry of confessed judgment.

## **ARGUMENT I**

### **A. QUESTION PRESENTED**

Is Appellee's factual assertion that it had no knowledge of the Appellants' residency true?

### **B. SCOPE OF REVIEW**

Where the Court is the trier of fact, the standard and scope of review in the Supreme Court is limited to whether the factual findings by a trial judge are sufficiently supported by the record and are the product of an orderly and logical deductive process, and the reviewing court will make contradictory findings of fact only when the findings below are clearly wrong and the doing of justice requires reversal. *Levitt v. Bouvier*, 287 A.2d 671 (Del. Supr. 1972); *Lank v. Steiner*, 224 A.2d 242, 245 (Del. Supr. 1966); *Adams v. Jankouskas*, 452 A.2d 148, 151 (Del. Supr. 1982); *Smith v. Van Gorkom*, 488 A.2d 858, 871 (Del. Supr. 1985).

### **C. MERITS OF THE ARGUMENT**

Attached hereto at Appendix AR-1 through AR-5 are the Zimmermans' personal tax returns for the years 2009, 2010, 2011, and Michael A. Zimmerman's 2010 personal financial statement (as of June 1, 2010).<sup>1</sup> All

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<sup>1</sup> AR-6.

such documents list the Zimmermans' state of residence as Florida.<sup>2</sup> In addition, an email string between Appellants and Appellee in 2010, a few months prior to execution of the Forbearance Agreement at issue, wherein Appellee asked for and received financial documents listing the state of residence as Florida, is attached at AR-8. These documents were necessary to the underwriting process of lending large sums of money, and, were clearly requested and received by Appellee despite assertions denying same.

Appellee alleges that “[n]o notice was provided to [Appellee] alleging that the [Zimmermans] were Florida residents... at the time the Forbearance Agreement was executed or at any time thereafter.”<sup>3</sup> This assertion is incorrect based on financial documents submitted to Appellee, and correspondence establishing that Appellee received same prior to execution of the Forbearance Agreement at issue. Furthermore, the assertion that no

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<sup>2</sup> Appellants attach pertinent pages of the above referenced financial documents, and on the pages submitted redact personal information, *i.e.*, social security numbers, and financial information not relevant to the issue of residency. Should opposing party object to redactions under DRE 106, Appellants respectfully request that the financial and personal information be submitted under seal.

<sup>3</sup> Appellee's Answering Br. at 8.

evidence of residency was provided “at any time thereafter”<sup>4</sup> is also incorrect, proved by submission via email to attorneys for Appellee.<sup>5</sup> Appellee’s argument based on estoppel for lack of notice must fail once the fact of the Zimmermans’ residency and notice thereof to Appellee is established. As to the latter clause in the preceding sentence, the Zimmermans’ residence is what it is, and failure of Appellee to inquire, if that should be the responsive argument, is not excused under the language of Super. Ct. R. Civ. P. 58.1(a)(3) and/or 10 *Del. C.* § 2306(c).

Appellee engages in further argument that its failure to conform to procedural requirements, *i.e.*, the affidavit required by Super. Ct. R. Civ. P. 58.1(a)(3), is irrelevant to the hearing required upon entry of confessed judgment should the obligor object. Appellee puts the cart before the horse by this argument, specifically, that defects in a creditor’s entry of confessed judgment are irrelevant to the subsequent hearing for the purpose of proving a knowing and voluntary waiver of Constitutional rights, ignoring the fact that entry of confessed judgment was invalid *ab initio* based upon Appellee’s failure to comply with statutory and procedural mandates. In short, Appellee ignores the fact that a creditor cannot get to the hearing until such time as the

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<sup>4</sup> Id.

<sup>5</sup> Appendix to Reply Br. at AR-8.

entry of confessed judgment is perfected under the law of the State of Delaware and procedural mandates of Delaware civil procedure.

**CONCLUSION**

**FOR THE FOREGOING REASONS**, this Honorable Court should **REVERSE** entry of judgment by confession as to Michael A. and Connie Jo Zimmerman.

Respectfully Submitted,

*/s/ Peter K. Schaeffer, Jr.*

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