UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL CAPIZZI and CATHERINE CAPIZZI, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 02-12319-DPW
STATES RESOURCES CORP., Defendant.	)	

MEMORANDUM AND ORDER
ON MOTION FOR RELIEF FROM JUDGMENT
January 20, 2005

Plaintiffs Michael Capizzi and Catherine Capizzi (collectively, the "Capizzis") move pursuant to Fed. R. Civ. P. 60(b) for relief from the default judgment entered against them in this action. As grounds for relief under 60(b)(1) and 60(b)(3), respectively, the Capizzis claim their own "mistake, inadvertence, surprise, or excusable neglect," and "fraud, misrepresentation, and other misconduct" on the part of defendant States Resources Corporation ("SRC"). The Capizzis also seek relief under the "catch-all" provision of 60(b)(6). For the reasons stated below, their motion is denied.

I. FACTS

Before addressing the merits of the Capizzis' motion, a summary of the history between these parties is in order. In October 1988, Michael Capizzi obtained a loan in the form of a $750,000.00 adjustable-rate note (the "Note") from Winchendon Savings Bank ("WSB") for use in development of the property

located at 236 Lincoln Road, Lincoln, MA (the "Property"), which the Capizzis thereafter occupied as their principal residence. Mr. Capizzi secured this loan by granting WSB a $750,000.00 mortgage (the "Mortgage") on the Property. In 1992, the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver for WSB and all WSB mortgages and security documents, including the Mortgage, were transferred to the FDIC. SRC obtained the Mortgage from the FDIC on September 30, 1998.

SRC initiated foreclosure proceedings for the Property in January 1999 based on its allegation that the Capizzis were in default on the Note. Prior to the scheduled foreclosure auction, the Capizzis made a payment to SRC and the auction was cancelled. Over the next year-and-a-half, SRC initiated foreclosure proceedings at least four more times against the Capizzis, each time cancelling the scheduled foreclosure auction after receiving a payment from the Capizzis.

In June 2001, the Capizzis commenced a civil lawsuit against SRC in the Middlesex Superior Court seeking a declaratory judgment and monetary damages for breach of contract and violation of Mass. Gen. Laws ch. 93A -- claims based on allegations regarding SRC's conduct related to the Note. SRC removed the case to federal court. Capizzi v. States Resources Corp., C.A. No. 01-11298-DPW (the "First Action"). On August 20, 2002, I dismissed the lawsuit due to the failure by the Capizzis both to meet their discovery responsibilities and to prosecute their claims. The Capizzis moved for reconsideration and,

following a hearing, I denied their motion. On September 30, 2002, I issued an amended order of dismissal making clear that the action was dismissed in its entirety without prejudice.

In September 2002, SRC once again commenced foreclosure proceedings against the Capizzis and scheduled a foreclosure auction for December 16, 2002. On December 2, 2002, the Capizzis filed the present action -- Capizzi v. States Resources Corp., C.A. No. 02-12319-DPW (the "Present Action") -- reiterating the allegations and prayers for relief made in the First Action, and also seeking a preliminary injunction enjoining SRC from proceeding with the December 16, 2002 foreclosure auction.

Following a December 13, 2002 hearing, I entered a stipulated order cancelling the December 16, 2002 foreclosure auction and enjoining SRC from rescheduling or advertising the foreclosure until further order of the court. Pursuant to my order, the Capizzis were obligated to pay SRC a sum of $6,177.76 on or before December 19, 2002 and by the nineteenth of the month each month thereafter; to post $219,771.95 in an escrow account on or before February 3, 2003; to provide proof to counsel for SRC that the real estate taxes on the Property were current and up to date as of December 31, 2002; and to provide proof to counsel for SRC that the Property was adequately insured with SRC listed as the mortgagee. The order specified that failure by the Capizzis to meet any one of these four obligations constituted grounds for SRC to apply to the court for an order vacating the preliminary injunction.

On January 22, 2003, the Capizzis moved for their attorneys in the Present Action, Kenneth Gordon and George Garfinkle, to withdraw as counsel. In my January 28, 2003 order granting this motion, I stated that "[t]here will be no modifications of the schedule previously established; any success[o]r counsel will be held to that schedule as will the plaintiffs if they continue pro se." SRC filed its answer to the Capizzis' complaint on February 13, 2003.

A brief detour to consider proceedings in bankruptcy court is necessary: On February 28, 2003, Michael Capizzi filed a voluntary petition for bankruptcy under Chapter 13 of the United States Bankruptcy Code (the "Code") in the United States Bankruptcy Court for the District of Massachusetts ("Bankruptcy Court"). SRC moved to dismiss the bankruptcy case on the grounds that, at the time of filing, Michael Capizzi was not an eligible Chapter 13 debtor because his secured debts exceeded the amount permissible under the Code. On March 5, 2003, the Bankruptcy Court granted SRC relief from the automatic stay in order for the Present Action to proceed to judgment. Michael Capizzi later filed a motion to voluntarily dismiss his Chapter 13 petition, which was granted by the Bankruptcy Court on May 1, 2003.

Returning to the Present Action, on March 13, 2003 SRC moved for entry of default against the Capizzis. On March 31, 2003, SRC moved to compel discovery, to dismiss the Capizzis' complaint, and for the entry of default judgment against the Capizzis. On April 3, 2003, I granted the motion by SRC for

entry of default against the Capizzis and notice of default issued the same day. On April 22, 2003, notice of a June 9, 2003 hearing and conference in the case was duly sent to all parties. On April 28, 2003, SRC filed a separate motion for the entry of default judgment against the Capizzis.

On May 20, 2003, Catherine Capizzi filed a voluntary petition for bankruptcy under Chapter 11 of the Code. In response, SRC filed various motions in Bankruptcy Court, including motions to dismiss the petition and for relief from the automatic stay in order to proceed to judgment in the Present Action. On May 28, 2003, the Bankruptcy Court -- for reasons including its determination that Catherine Capizzi did not have an interest in the Property within the meaning of Chapter 11 of the Code -- granted SRC relief from the automatic stay.

On June 9, 2003, I granted SRC's motion for default judgment against the Capizzis due to their failure to plead or otherwise defend against the counterclaims SRC had asserted against them, and allowed SRC's motion to dismiss the Capizzis' complaint with prejudice. Upon application from SRC, which was supported by the requisite affidavits, I entered judgment the same day for SRC against the Capizzis in the amount of $875,203.38.

SRC conducted a foreclosure auction at the Property on September 26, 2003 and Kevin Duffy ("Duffy") was the high bidder with an offer of $1,200,000.00. Duffy thereafter prevailed against the Capizzis in a summary process action in the Concord District Court to recover possession of the Property. The

Capizzis were unable to perfect their appeal of the trial court decision. Duffy obtained execution from the court and notified the Capizzis of his intent to levy upon it and evict them from the Property on March 17, 2004.

On March 16, 2004, the Capizzis filed suit against Duffy and SRC in this court -- Capizzi v. States Resources Corp., C.A. No. 04-10533-DPW (the "Third Action") -- seeking, among other relief, a temporary restraining order enjoining Duffy from levying on the execution and relief from judgment in the Present Action under Fed. R. Civ. P. 60(b)(1)-(3). The Capizzis contended that they were entitled to relief under 60(b) based on their allegations that: (1) SRC had presented a fraudulent affidavit to the Court in the Present Action; and (2) SRC had ignored their requests to reinstate the Mortgage. I denied the request for injunctive relief for reasons set forth in detail in my decision of March 16, 2004. The Capizzis were evicted from the Property on March 17, 2004 and thereafter voluntarily dismissed the Third Action.

On June 8, 2004, the Capizzis filed the present motion for relief from judgment under Rule 60(b).

II. ANALYSIS

Fed. R. Civ. P. 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding" for reasons including the following three claimed by the Capizzis as the bases for their motion:

> (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

Whether to grant a Rule 60(b) motion is committed to the sound discretion of the district court. See de la Torre v. Continental Ins. Co., 15 F.3d 12, 14 (1st Cir. 1994).

In support of their assertion that "[m]any courts have held that Rule 60 should be liberally construed so that 'judgments will reflect the true merits of a case,'" the only First Circuit decision cited by the Capizzis is Davila-Alvarez v. Escuela de Medicina Universidad Central del Caribe, 257 F. 3d 58 (1st Cir. 2001). A parenthetical was in order. When laying the groundwork for 60(b) analysis in Davila-Alvarez, the exact words of the First Circuit were as follows: "Although many courts have indicated that Rule 60(b) motions should be granted liberally, this Circuit has taken a harsher tack." Id. at 63-64. The court continued: "Because 60(b) is a vehicle for 'extraordinary relief,' motions invoking the rule should be granted 'only under extraordinary circumstances.'" Id. at 64 (quoting Lepore v. Vidockler, 792 F.2d 272, 274 (1st Cir. 1986)). The "bare minimum" of which a party seeking Rule 60(b) relief must persuade the court is:

> that his motion is timely; that exceptional circumstances exist, favoring extraordinary relief; that if the judgment is set aside, he has the right stuff to mount a potentially meritorious claim or defense; and that no unfair prejudice will accrue to the opposing parties should the motion be granted.

Karak v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir. 2002) (citing Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 20-21 (1st Cir. 1992)). The arguments advanced by the Capizzis in support of their motion neither satisfy the requirements of the subsidiary prongs of Rule 60(b) under which they seek relief nor this more generally phrased standard.

1. Mistake, Inadvertence, or Excusable Neglect

The Capizzis seek relief from the default judgment under 60(b)(1), claiming mistake or excusable neglect in the form of their misapprehending that their various proceedings in Bankruptcy Court "stayed all action in this case." The Capizzis ascribe this error to their not being advised otherwise by their bankruptcy attorneys as they proceeded pro se in the Present Action.

I take up first the "excusable neglect" theory. To warrant relief under 60(b)(1) for excusable neglect, the Capizzis must demonstrate, "[a]t a bare minimum, . . . a convincing explanation as to why the neglect was excusable." Cintron-Lorenzo v. Departamento de Asuntos del Consumidor, 312 F.3d 522, 527 (1st Cir. 2002). The First Circuit set forth the parameters of "excusable neglect" analysis in Davila-Alvarez:

> Our evaluation of what constitutes excusable neglect is an equitable determination, taking into account the entire facts and circumstances surrounding the party's omission, including factors such as the danger of prejudice to the non-movant, the length of the delay, the reason for the delay, and whether the movant acted in good faith.

Id., 257 F.3d at 64.

The danger of prejudice to the non-movant, SRC, should the Capizzis' motion be granted is clear. Since the date on which default judgment entered against the Capizzis, SRC has sold the Property at foreclosure auction to a third-party, Duffy, who thereafter employed court process to evict the Capizzis. Duffy has since sold the Property to another third-party. Rule 60(b) "must be applied so as to 'recognize the desirability of deciding disputes on their merits,' while also considering 'the importance of finality as applied to court judgments.'" Id. (quoting Teamsters, 953 F.2d at 19-20). Although the balance of equities is not determinative in this instance, it does militate in favor of denying the motion.

I turn now to the length of delay by the Capizzis in responding to the default judgment. A motion for relief from judgment under Rule 60(b)(1) must be made "not more than one year after the judgment, order, or proceeding was entered or taken." Id. Here, the Capizzis waited until the three-hundred-and-sixty-fifth day after the entry of default judgment to file their motion for relief.[1] The Capizzis offer no explanation for their tardiness in bringing this motion, but in support of their argument that "[j]udgments have been set aside where they were based on failure to appear at trial" cite the case of Denman v.

[1]This filing was the first action the Capizzis had taken in the case since January 22, 2003, when they moved for their attorneys to withdraw as counsel.

Shubow, 413 F.2d 258 (1st Cir. 1969), in which a pro se party missed a court date for medical reasons (i.e., oversleeping due to a prescribed medication), contacted the court immediately upon recognizing the situation, attempted to present his explanation to the presiding judge that afternoon, and, when unsuccessful in doing so, filed a motion for reconsideration the same day. See id. at 258-59. The attempt by the Capizzis to assimilate their situation to that of Mr. Denman is unconvincing. Unlike Mr. Denman, who "acted promptly to remedy the situation," the Capizzis waited a full year after default judgment entered against them to take further action in this case. That the Capizzis were pro se or that they had been proceeding in Bankruptcy Court are not sufficient reasons for their dilatoriness. The Capizzis received notices from this court regarding the entry of default against them and the motions by SRC for the entry of default judgment and to dismiss their case with prejudice. They failed either to submit responsive pleadings or to attend the June 9, 2003 hearing, of which they were also duly notified. After they were notified that default judgment had entered against them in the amount of $875,203.38 and that their case had been dismissed with prejudice, it is clear beyond peradventure that the Capizzis were on notice that the Present Action was proceeding despite the pending Bankruptcy Court case. The Capizzis offer no explanation regarding their delay in bringing this action. This factor also, then, weighs in favor of denying their motion.

As noted above, the Capizzis maintain that the reason for their failure to respond to the counterclaims by SRC, which resulted in entry of the default judgment they now challenge, was that Michael Capizzi "fully believed that the Bankruptcy proceeding would stay any further action in this proceeding, so he was not attentive to the procedural demands of this case." This assertion is belied by the fact that the Capizzis received multiple notices from this court regarding further developments in the Present Action subsequent to the filing of their respective bankruptcy petitions. Among these further communications was notice of the June 9, 2003 hearing on the motions by SCR for entry of default judgment against the Capizzis and for the dismissal of their claims with prejudice, a hearing that took place more than a month after Michael Capizzi had voluntarily dismissed his Chapter 13 bankruptcy case.

Even if the Capizzis possessed against all evidence a good-faith belief that the Bankruptcy Court proceedings stayed further action in this court, they had a duty to confirm this interpretation with the court in light of further developments and associated deadlines in the Present Action as to which they were apprised. The First Circuit has stated in no uncertain terms the obligations of a party to communicate with the court:

> As we explained two decades ago, a party's 'first obligation is to make every effort to comply with the court's order. The second is to seek consent if compliance is, in fact, impossible. And the third is to seek court approval for noncompliance based on a truly valid reason.'

Cintron-Lorenzo, 312 F.3d at 527 (quoting Damiani v. R.I. Hosp.,

704 F.2d 12, 17 (1st Cir. 1983)). The utter failure by the Capizzis to notify this court of their parallel maneuvering in Bankruptcy Court, or to query whether they were thereby relieved of their ongoing obligations in this action, renders their neglect in protecting their interests far from "excusable."

Finally, misunderstanding the effect of proceedings in Bankruptcy Court on the progress of the Present Action -- and even receiving erroneous advice from their bankruptcy attorneys on this point -- does not constitute a "mistake" for which the Capizzis may be granted relief under 60(b)(1). See, e.g., Cashner v. Freedom Stores, Inc., 98 F.3d 572, 577 (10th Cir. 1996) (finding that "60(b)(1) relief is not available for a party who simply misunderstands the legal consequences of his deliberate acts"); Bershad v. McDonough, 469 F.2d 1333, 1337 (7th Cir. 1972) (holding that "[n]either ignorance nor carelessness on the part of a litigant or his attorney will provide grounds for rule 60(b) relief"); cf. Davila-Alvarez, 257 F.3d at 66 (in rejecting argument that dismissing the case "based on counsel's inexcusable conduct would work an unjust penalty on the litigants" relying on Supreme Court determination in Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962), that "[p]etitioner voluntarily chose this attorney as his representative . . . and he cannot now avoid the consequences of the acts or omissions of this freely selected agent").

For the reasons set forth above, the Capizzis have failed to demonstrate "mistake" or "excusable neglect" warranting relief

under 60(b)(1).

2. Fraud, Misrepresentation, or Other Misconduct

To prevail under Rule 60(b)(3), the Capizzis must meet a two part test. "First, [they] must demonstrate misconduct -- such as fraud or misrepresentation -- by clear and convincing evidence. Second, [they] must 'show that the misconduct foreclosed full and fair preparation or presentation of [their] case.'" Karak, 288 F.3d at 21 (internal citations omitted) (quoting Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir. 1988)). Furthermore, the alleged misconduct "must substantially have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed" to judgment. Anderson, 862 F.2d at 924 (emphasis in original). A trial court is "free to deny relief under Rule 60(b)(3)" when it finds that the challenging party was "capable of fully and fairly preparing and presenting his case notwithstanding the adverse party's arguable misconduct." Karak, 288 F.3d at 21-22.

The Capizzis make the following specific allegations in their motion regarding fraud, misrepresentations, or other misconduct by SRC:

> "Defendant repeatedly threatened foreclosure against Plaintiffs to coerce extraordinarily excessive payments from Plaintiffs who were not delinquent under their note."
>
> "Defendant scheduled a foreclosure sale for September 26, 2003. Plaintiffs contacted Defendant by fax and mail and telephone in an effort to exercise the reinstatement clause of the mortgage and note, but the mortgagee never responded to their several requests and proceeded with the foreclosure auction."

> "Defendant States Resources Corp. knowingly submitted blatantly false pleadings and false affidavits to contradict Plaintiffs' allegations and support its own outrageous counterclaim that Plaintiffs owed $875,203.00 under their note. In fact Defendant had made no effort to amortize the note, was charging interest at an adjustable rate that was clearly erroneous and in conflict with the flat rate established and confirmed by its predecessors, made no effort to adjust that rate, and failed to escrow real estate taxes and failed to forward tax escrow funds to the Town of Lincoln, Massachusetts, as required by the note and mortgage."
>
> "Plaintiffs did not have an opportunity to present their evidence because the default judgment was rendered before any trial on the merits, but the evidence is clear that Plaintiffs were not delinquent in their payments under the note and that Defendant continuously misrepresented Plaintiffs' obligations thereunder and intimidated Plaintiffs into making excessive payments through continuous threats of foreclosure. Defendant's fraud prevented Plaintiffs from fully and fairly presenting their case."

These bare allegations[2] regarding SRC's conduct in handling the Note and foreclosing on the Property neither compel nor permit the conclusion asserted by the Capizzis that the supposed "fraud" on the part of SRC "prevented [them] from fully and fairly presenting their case."

Even accepting, simply for the sake of argument, that SRC actually engaged in the misconduct alleged, the Capizzis have

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[2]The First Circuit has spoken on what material a court need consider when resolving a Rule 60(b) motion:

> Although a court, for purposes of a Rule 60(b) motion, sometimes may assume the truth of fact-specific statements proffered by the movant, it need not credit 'bald assertions, unsubstantiated conclusions, periphrastic circumlocutions, or hyperbolic rodomontade.'

Karak v. Bursaw Oil Corp., 288 F.3d 15, 20 n.3 (1st Cir. 2002) (quoting Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 18 (1st Cir. 1992)).

made no showing whatsoever that these assorted misdeeds impeded them in "fully and fairly" preparing their case for presentation to the court. See Karak, 288 F.3d at 20-21. For example, there has been no allegation, let alone a showing, that SRC failed to serve the Capizzis with copies of motions it filed in the Present Action, somehow interfered with the Capizzis receiving notice from the court of important developments and deadlines, or engaged in discovery abuses. See Anderson, 862 F.2d at 923 (holding that "[f]ailure to disclose or produce materials requested in discovery can constitute 'misconduct' within the purview" of Rule 60(b)(3)). The entirety of the Capizzis' allegations pertain to the merits of the underlying claims rather than the preparation and presentation of those claims to the court, thereby rendering 60(b)(3) inapplicable. See Karak, 288 F.3d at 22 ("Rule 60(b)(3) is designed to afford protection against judgments that are unfairly obtained rather than against judgments that are factually suspect."). Given the failure by the Capizzis to demonstrate that the alleged misconduct by SRC "foreclosed full and fair preparation or presentation" of their case to the court, Anderson, 862 F.2d at 923, I find that they are not entitled to relief from judgment under 30(b)(3). See Karak, 288 F.3d at 21-22.

3. Relief Under 60(b)(6) for "Any Other Reason"

The Capizzis also advance an argument for redress under 60(b)(6), which permits a court to grant relief for "any other reason justifying relief from the operation of the judgment."

The Capizzis note that 60(b)(6) "[i]s not a substitute, however, for the prior provisions of Rule 60(b)." Once again, the Capizzis tell only half the story. In point of fact, "[s]ince Rule 60(b)(6) is designed as a catchall, a motion under it is appropriate only when none of the first five sections pertain, and section (6) may not be used as means to circumvent those five preceding sections." Ahmed v. Rosenblatt, 118 F.3d 886, 891 n.9 (1st Cir. 1997) (emphasis added); see also Davila-Alvarez, 257 F.3d at 67 (holding that Rule 60(b)(1) and 60(b)(6) are "mutually exclusive").

The Capizzis provide no factual or legal basis for their request for relief under 60(b)(6). The argument by the Capizzis that "[j]ustice requires that the default judgment be vacated so that Plaintiffs will have the opportunity to try their claims on the merits" does not satisfy the exacting standard for entitlement to relief under 60(b)(6), pursuant to which "a party must show extraordinary circumstances suggesting that the party is faultless in delay." Davila-Alvarez, 257 F.3d at 67 (internal quotations omitted) (quoting Pioneer Inv. Services Co. v. Brunswick Assoc., 507 U.S. 380, 393 (1993)). The Capizzis have failed to demonstrate -- or even allege -- "extraordinary circumstances" justifying relief under 60(b)(6). That the Capizzis were not "faultless is delay" is apparent from their failure, discussed supra, to prosecute their claims diligently and otherwise to protect their interests. See Cotto v. United States, 993 F.2d 274, 278 (1st Cir. 1993) ("In our adversary

system of justice, each litigant remains under an abiding duty to take the legal steps that are necessary to protect his or her own interests.").

Furthermore, "[a]n additional precondition to relief under Rule 60(b)(6) is that the mov[a]nt make a suitable showing that he or she has a meritorious claim or defense." Id. at 280. Although the Capizzis continue to maintain that SRC fraudulently and illegally foreclosed upon the Property, they have yet to adduce any competent documentary or testamentary evidence supporting these allegations. Their unsubstantiated allegations, made in the course of multiple court proceedings in various forums (e.g., this court, Bankruptcy Court, numerous state courts), do not constitute the requisite suitable showing.

III. CONCLUSION

For the reasons set forth more fully above, I deny the Capizzis' motion for relief from judgment under Fed. R. Civ. P. 60(b).

/s/ Douglas P. Woodlock
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DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE