HOME SAV. & LOAN ASS'N V. ESQUIRE HOMES, INC., 1974-NMSC-088, 87 N.M. 1, 528 P.2d 645 (S. Ct. 1974)

**HOME SAVINGS AND LOAN ASSOCIATION, Plaintiff-Appellant,
vs.
ESQUIRE HOMES, INC., L. B. Edmondson, aka Lester B. Edmondson and Helen C. Edmondson, Frank J. Southerland, American Builders Supply of Albuquerque, a Division of Bates Lumber Co., Inc., Dar Tile, Inc. and Albuquerque Federal Savings and Loan Association,
Defendants-Appellees.**

No. 9886

SUPREME COURT OF NEW MEXICO

1974-NMSC-088, 87 N.M. 1, 528 P.2d 645

November 15, 1974

COUNSEL

Franks & de Vesty, Michael F. Croom, Albuquerque, for plaintiff-appellant.

Robinson, Stevens & Wainwright, Paul S. Wainwright, Albuquerque, for defendants-appellees.

JUDGES

MARTINEZ, J., wrote the opinion. McMANUS, C.J., and MONTOYA, J., concur.

AUTHOR: MARTINEZ

OPINION

MARTINEZ, Justice.

{1} Initially, this action was filed in July of 1966 in the District Court of Bernalillo County by plaintiff-appellant, Home Savings and Loan Association, which sought to foreclose three mortgages. After service of summons upon defendants-appellees, Frank Southerland and Julia C. Southerland, a default judgment was entered against them on January 6, 1967. Thereafter, in March of 1967, a deficiency judgment in the sum of $14,054.13 was entered against defendants following sale of certain real estate. On

April 27, 1973, the defendant, Julia C. Southerland (Frank Southerland having since died), filed a motion in the trial court to set aside the default judgment pursuant to Rules 55 and 60(b)(6), Rules of Civil Procedure [§§ 21-1-1(55), 21-1-1(60)(b)(6), N.M.S.A. 1953 (Repl. Vol. 4, 1970)]. Following a hearing, the trial court sustained defendant's motion, concluding from the facts adduced that defendant had a meritorious defense to the action and that the deficiency judgment was unjust and should be set aside.

{2} The trial court found that, at the time of the commencement of the original suit in 1966, Frank Southerland advised his wife, Julia, of a letter written by an officer of the Home Savings and Loan Association, relieving defendants of any liability concerning the mortgages which were the subject of the foreclosure action. Although defendant now denies that the signature on the guarantees sued upon by Home Savings and Loan *{*2}* was, in fact, hers, she did not enter an appearance or cause an answer to be filed because of the information as to the purported release, given to her by her husband. At the evidentiary hearing, in support of defendant Southerland's motion, a letter dated February 19, 1964 and addressed to Frank Southerland was introduced into evidence in the action below, under signature of Brad Huckabee, purporting to be a Vice-President of Home Savings and Loan Association. The letter concluded:

"The following is a list of mortgages that you and your wife signed and became responsible for. As of this date, Home Savings will release you from the liability of these mortgages."

{3} The court below further found that, after entry of the deficiency judgment, defendant entered into a negotiated settlement of the judgment at a time when she was unable to locate a copy of the above-quoted letter of February 19, 1964, and, at the time of the hearing, had actually paid the sum of $3,500.00 on such settlement when she again located the original letter described above.

{4} Concluding that such deficiency judgment was unjust, the trial court found that the defendant should be allowed to proceed by filing her answer and proceed to trial and that plaintiff's rights would not be substantially affected by allowing her to do so. The court found further that the plaintiff should tender to the court all sums paid towards the extinguishment of the deficiency judgment.

{5} From this judgment, plaintiff appeals, contending that the trial court abused its discretion in overturning the judgment against defendant-appellee, since the evidence does not warrant or support such action and that the motion under Rule 60(b)(6), supra, of defendant-appellee was not "timely."

{6} Initially, we must determine if the trial court acted within a "reasonable time" according to Rule 60, supra. In Freedman v. Perea, 85 N.M. 745, 746-747, 517 P.2d 67, 68-69 (1973), where this Court affirmed the setting aside of judgment as to one of the appellees, as in the case here, this Court stated:

"The only time limit on a motion seeking relief under Rule 60(b)(6) is that it be made within a reasonable time. [Citations omitted.] What constitutes a reasonable time, however, depends on the circumstances of each case. [Citations omitted.]

Based on an evaluation of all the facts in this case, we believe the trial court acted within a reasonable time.

{7} There is also involved the question of whether or not the trial court abused its discretion in granting the motion for relief under Rule 60, supra. According to Freedman, supra:

"Whether a judgment will be set aside under Rule 60(b), supra, is ordinarily a matter within the trial court's discretion. [Citations omitted.] Furthermore, the trial court's determination will ordinarily not be reversed except for an abuse of discretion. [Citations omitted.]

{8} Absolutely no showing has been made that the lower court abused its discretion and, accordingly, the judgment of the trial court is affirmed.

{9} It is so ordered.

McMANUS, C.J., and MONTOYA, J., concur.