IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re National Century Financial Enterprises, Inc., Investment Litigation.	:	Case Nos. 2:03-md-1565, 2:04-cv-1035
	:	Judge Graham
	:	

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Lance Poulsen,	:	
		Case No. 2:04-cv-269
Plaintiff,	:	
v.		
	:	
Bank One, N.A..,		
	:	
Defendant.		

ORDER

This matter is before the court on plaintiff Lance Poulsen's motion for relief from judgment under Fed. R. Civ. P. 60(b)(1) and his motion for leave to file an amended complaint.

On April 6, 2012, the court issued an order for Poulsen to show cause why his complaint should not be dismissed under the doctrine of *in pari delicto* (doc. 1859). See Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306-07 (1985). The order provided Poulsen, who is incarcerated in a federal correctional institution, thirty days from the date of receipt of the order to show cause. After the clerk of court's initial attempt to mail the show cause order was returned on April 18, 2012 as undeliverable (doc. 1860), the clerk of court again mailed the order to Poulsen a week later (see Apr. 25, 2012 staff note entry).

On May 7, 2012, the court received from Poulsen a document captioned as "Plaintiff's Response to Court's Order to Show Cause" (doc. 1865). This response presented Poulsen's reasons for why he should be allowed to carry forward with his lawsuit. Thus believing that Poulsen had received and responded to the April 6, 2012 show cause order, the court proceeded to render a decision on May 9, 2012 (doc. 1868). In the decision, the court found that the *in pari delicto* doctrine represents an

insurmountable bar to Poulsen's claims against Bank One and therefore instructed the clerk to enter final judgment in favor of Bank One.

On May 24, 2012, the court received from Poulsen a combined motion to set aside the judgment and motion for leave to file an amended complaint (doc. 138 in Case No. 2:04-cv-1035). Poulsen states that he placed his prior response (doc. 1865) in the mail on May 2, 2012 at 11:30 a.m., but did not receive the court's show cause order until 4:30 pm on that same day. Poulsen explains that he had received an informal communication in April about the existence of a show cause order, but did not receive and read the order until May 2.

Rule 60(b) "provides that a district court may, in its discretion, relieve a party from a final judgment on grounds of 'mistake, inadvertence, surprise, or excusable neglect.'" Pilla v. U.S., 668 F.3d 368, 373 (6th Cir. 2012). "In determining whether relief is appropriate under Rule 60(b)(1), courts consider three factors: (1) culpability—that is, whether the neglect was excusable; (2) any prejudice to the opposing party; and (3) whether the party holds a meritorious underlying claim or defense. A party seeking relief must first demonstrate a lack of culpability before the court examines the remaining two factors." Yeschick v. Mineta, 675 F.3d 622, 628-29 (6th Cir. 2012) (internal quotation marks omitted).

Poulsen argues that it was a mistake for the clerk's office not to timely serve him with the show cause order. The court must reject this characterization. The clerk properly re-mailed the show cause order after the first mailing was returned as undeliverable. It was because of the potential of a time delay in communicating with Poulsen that the court made the show cause order effective only once Poulsen's received it. The clerk's first attempt to mail the order is not a mistake for which Rule 60(b) relief is warranted. The court agrees, though, with Poulsen that he is in no way culpable for the initial failed attempt to mail the order to him.

Poulsen also argues that relief is warranted on the ground of surprise. He argues that he would have responded differently to the show cause order had he received it before placing his response in the mail on May 2. However, Poulsen does not state how he would have responded differently other than making a conclusory assertion that he has "meritorious defenses" to the *in pari delicto* doctrine.

The court dismissed Poulsen's complaint not because he failed to respond to the show cause

order, but because nothing he presented in his May 2 response constituted a legally sufficient defense to the *in pari delicto* doctrine. Poulsen's current motion offers no additional reasons why his complaint would not fail under the doctrine. Poulsen instead requests leave to amend his complaint. It almost goes without saying that this request, filed after final judgment was entered, is untimely. See Colvin v. Caruso, 605 F.3d 282, 294-95 (6th Cir. 2010) ("A motion to amend a complaint should be denied if the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile.") (internal quotation marks omitted).

The request for leave to amend is also futile. Poulsen attached to his May 2 response what appears to be a proposed amended complaint, and the court considered the allegations contained therein in determining whether he had shown cause why his complaint should not be dismissed. Having reviewed these allegations afresh in light of Poulsen's current Rule 60(b)(1) motion and motion for leave to amend, the court again concludes that nothing Poulsen has alleged against Bank One overcomes the core concern of the *in pari delicto* doctrine. As between Poulsen and Bank One, Poulsen is substantially responsible for National Century's collapse. U.S. v. Poulsen, 655 F.3d 492 (6th Cir. 2011), *cert. denied*, 132 S.Ct. 1772 (2012). He is thus precluded from recovery under the doctrine of *in pari delicto*. See Bateman Eichler, 472 U.S. at 310-11 (1985); Pinter v. Dahl, 486 U.S. 622, 636 (1988); In re Dublin Securities, Inc., 133 F.3d 377, 380 (6th Cir. 1997).

Accordingly, Poulsen's motions for relief from judgment and for leave to amend (doc. 138 in Case No. 2:04-cv-1035) are DENIED.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: July 3, 2012