

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
In the Court of Common Pleas
Sixteenth Judicial Circuit

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2013-002791

RECEIVED

JUN 23 2014

SC Court of Appeals

Provident Community Bank, Respondent,

v.

Coulston Enterprises, Inc., Alfred Earl Coulston a/k/a A. Earl Coulston, Red Clay Industries, Inc., Glen Ridge Owners Association, Inc. and HD Supply Waterworks, Ltd., Defendants,

of whom

Alfred Earl Coulston a/k/a A. Earl Coulston is the Appellant.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Case	1
Argument.....	2
I. Did the trial judge err in finding that there was a clerical mistake and/or an error arising from an oversight or omission and thereby amending the final order?	2
II. Did the trial court err in amending the judgment pursuant to rule 60(a) of the South Carolina Rules of Civil Procedure as the motion was not timely?	4
Conclusion	6

TABLE OF AUTHORITIES

Statutes and Rules

	<i>Page</i>
<u>Black’s Law Dictionary 252</u> (6 th Ed 1990)	3
<u>Dion v. Ravenel, Eiserhardt Associates, a South Carolina Limited Partnership, et al.</u> 316 S.C. 226, 449 S.E. 2d 251, 253 (Ct. App. 1994).....	3
<u>Michel v. Michel</u> 289 S.C. 187, 345 S.E.2d 730 (Ct. App. 1986)	3
<u>Paul Davis Systems, Inc. v. Deepwater of Hilton Head, LLC</u> , 362 S.C. 220, 607 S.E. 2d 358 (Ct. App. 2004)	5
<u>Richardson v. P.V., Inc.</u> , 383 S.C. 610, 682 S.E. 2d 263 (2009).....	5
Rule 59(e).....	4
Rule 60(a).....	1, 2, 4, 5
Rule 60(b)	1, 2, 5
Rule 60(b)(1).....	2
Rule 60(b)(1,2 or 3)	4
SCACR 203(b)	4]

STATEMENT OF THE CASE

The Respondent Provident Community Bank commenced a foreclosure action against the above listed Defendants on March 30, 2011 and obtained a Judgment of Foreclosure and Sale on October 5, 2011 (R. pp. 1-12). The order was filed October 7, 2011. The Respondent was represented by Michael Hatch and the defendants Alfred Earl Coulston a/k/a A. Earl Coulston and Coulston Enterprises, Inc. were in default.

The property was sold and the court filed an Order on Sale of Real Estate and Report of Sale and Disbursement and entered an Order of Deficiency Judgment on January 19, 2012 against Coulston Enterprises, Inc. (R. pp. 13, 20-21, 16)

On October 8, 2013 the Respondent, through counsel, filed a motion to amend deficiency judgment pursuant to rule 60(b) of the South Carolina Rules of Civil Procedure. (R. pp. 58-59) Then on November 5, 2013, Respondent filed an amended motion to correct clerical mistake and deficiency judgment under rule 60(a) of the South Carolina Rules of Civil Procedure. (R. pp. 60-62) The Appellant Alfred Earl Coulston also known as A. Earl Coulston, filed a reply to the motion denying the Respondent should be entitled to an amended order. (R. pp. 63-64)

The case came before the Hon. S. Jackson Kimball, Master in Equity, who was also the trial judge, on November 21, 2013. Each party argued their position. (R. pp. 65-81)

The court entered a final order entitled Amended Order of Deficiency Judgment dated December 4, 2013 and filed December 4, 2013, entering the deficiency judgment against Alford Earl Colton also known as A Earl Coulston, thereby amending the prior order of the court as to a deficiency and entered the deficiency against Appellant individually. (R. p. 19)

The appellant filed a timely appeal on December 16, 2013 appealing the court's Amended Order of Deficiency against the appellant in his individual capacity.

ARGUMENT

- I. THE TRIAL JUDGE ERRED IN FINDING THAT THERE WAS A CLERICAL MISTAKE AND/OR AN ERROR ARISING FROM AN OVERSIGHT OR OMISSION AND THEREBY AMENDING THE FINAL ORDER.

Rule 60(a) of the South Carolina Rules of Civil Procedure authorizes a trial judge to correct a clerical mistake or error in a judgment or order. The Rule is as follows:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, leave to correct the mistake must be obtained from the appellate court. The ending of a term of court or departure from the circuit shall not operate to deprive the trial judge of jurisdiction to correct such mistakes. A party filing a written motion under this rule shall provide a copy of the motion to the judge within 10 days after the filing of the motion.

Respondent filed a motion first pursuant to Rule 60 (b)(1) of the SCRCPP asserting he made a scrivener's error when he delivered the proposed order for deficiency judgment to the court and deleted the Appellant Alfred Ear Coulston from the Order for deficiency judgment. The problem with the Respondent's motion pursuant to Rule 60(b) is that he had to make that motion within one year of entry of the judgment. Respondent did not fall within the one year time limit. (R. p. 16; R. pp. 60-62) As such he was foreclosed from arguing his motion under Rule 60(b) and had to proceed under a different theory and filed an amended motion under Rule 60(a) of the SCRCPP. The problem is that the Respondent is asserting it was a mistake and that the court has the inherent right to correct, even though 23 months had passed since the filing and service of the deficiency judgment.

Appellant submits that the correction is not and should not be classified as a clerical mistake thereby enabling the trial court to modify the final order. In the case Dion v. Ravenel, Eiserhardt Associates, a South Carolina Limited Partnership, et al., 316 S.C. 226, 449 S.E.2d 251, 253 (Ct. App. 1994), the court set forth “Generally, a clerical error is defined as a mistake in writing or copying. See Black’s Law Dictionary 252 (6th Ed 1990). As applying to judgments and decrees, it is a mistake or omission by clerk, counsel, judge or printer which is not the result of exercise of judicial function. Id. While a court may correct mistakes or clerical errors in its own process to make it conform to the record, but cannot change the scope of the judgment. Michel v. Michel 289 S.C. 187, 345 S.E.2d 730 (Ct. App. 1986).” In Dion, the trial judge had amended the judgment to change the description of the land included in a decree of foreclosure. The court of appeals set forth that by adding the causeway to the description, the master had reformed the mortgage thereby specifically recognizing that the causeway was not specifically contemplated in the prior judgment. Had it been obvious, there would have been no need to reform the description.

The same analogy exists in the case at hand. If the judgment of foreclosure included the judgment against the Appellant and therefore the **final order setting forth the deficiency** should have included it, then it would not be necessary to amend the deficiency judgment to add the Appellant to the deficiency judgment. The addition of the Appellant to the deficiency judgment expands the order and enters a judgment against the Appellant 23 months after he believed the case to have ended without such a deficiency. The most telling point as to the court’s decision was that it ordered the deficiency to have only prospective application and not be retroactive to the date of the original entry of the order. Appellant acknowledges that he brought this issue to the court’s attention in response to the arguments at the hearing but this fact demonstrates why this change in the judgment is not and should

not have been considered a mistake for which the Respondent was entitled to relief. (R. pp. 69-75, 78-80)

The Respondent had notice of the deficiency in January 2012 as the court sent the Respondent the deficiency judgment at that time as is indicated on the order. Therefore, the Respondent should have filed a timely Rule 59(e) motion to address this in January 2012, not November 2013.

II. THE TRIAL COURT ERRED IN AMENDING THE JUDGMENT PURSUANT TO RULE 60(a) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AS THE MOTION WAS NOT TIMELY.

The trial court erred in amending the judgment against him in his individual capacity on December 4, 2013 when the original order of deficiency was entered in this action on January 19, 2012. The case originally ended with the entry of the deficiency judgment against the corporate Defendant Coulston Enterprises, Inc. on January 19, 2012. The deficiency was entered after the sale of the asset and an accounting to the court of the proceeds of the sale. (R. p. 13; R. pp. 20-21) SCRCR 60(a) does set forth that the clerical mistakes **may** be corrected at any time on the court's own initiative or on motion of the party. The rule does not mandate that a correction be made. As such, the issues are whether there is an unlimited amount of time and how the court should decide if the clerical mistake should be corrected assuming the court has found that it was a clerical mistake.

Although there is no time limit set forth in the rule itself, the Appellant submits that there must be some amount of time after which a trial court cannot correct a clerical mistake and in this case, the trial court should not have made any change to the clerical mistake. In a civil case, a party can appeal the case for up to thirty (30) days after entry of the order. (SCACR 203(b)) A party has then (10) days to file post trial motions pursuant to Rule 59. A party must file a motion pursuant to Rule 60(b)(1, 2, or 3) no longer than one year after the

judgment, order or proceeding was entered or taken. SCRCP 60(a) provides a means by which a clerical mistake can be fixed while a case is on appeal. Therefore, Appellant submits that the error should only be corrected if relief is sought within a reasonable time where a party knew or should have known of the error but no longer than thirty days from such knowledge or imputed knowledge.

Appellant is not aware of a bright line rule for when a Rule 60(a) motion is no longer viable but submits it is not indefinite. In the case at hand, the Respondent knew or should have known of the error in January 2012 when it received the Order but Respondent failed to act on that knowledge. Had Respondent pursued the motion under Rule 60(b) for mistake or excusable neglect and filed the motion within the years time, it would have had to have shown good cause and it would have had the burden of proof in demonstrating good cause. The Respondent actually did file the motion pursuant to Rule 60(b) at the outset. In demonstrating good cause under Rule 60(b), one of the factors the court always considers is the party's conduct and the timeliness of the motion. (See for example Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263 (2009); Paul Davis Systems, Inc. v. Deepwater of Hilton Head, LLC, 362 S.C. 220, 607 S.E.2d 358 (Ct. App. 2004).) In this case the Respondent was not timely and had the opportunity in 2012 to address this issue. Respondent was on notice of the "error".

Appellant submits that the trial court erred when it amended the deficiency judgment and entered a judgment against the Appellant 23 months after the case had ended. The trial court did not perform any analysis of the prejudice to the Appellant in taking the action it had taken. The trial court did not take any evidence as to why there was a delay of some 21 months before the Respondent brought the issue before the court, and specifically what prompted the Respondent to now look at potentially seeking assets from the Appellant.

Appellant submits and argued to the trial court that it should make findings of fact as to the issues before the court. Appellant argued that allowing the judgment to be modified at this juncture was prejudicial to the Appellant. For instance, how long does the deficiency judgment now last against the Appellant, ten (10) years from 2012 or ten (10) years from December 2013? The Appellant had conducted business for 23 months under the belief that there was no deficiency judgment against him personally and as such, the court should have considered the effect or the prejudice to the Appellant of now entering a deficiency against him.

The trial judge failed to consider any of these factors but found that the judgment should be amended prospectively and be entered against the Appellant, which Appellant submits was error.

CONCLUSION

For the above reasons, the court should reverse the trial court and vacate the deficiency judgment against the Appellant.

York, South Carolina

June 18, 2014

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PROOF OF SERVICE

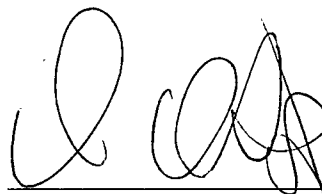
I certify that I served the **FINAL BRIEF OF APPELLANT** on the respondent by depositing a copy of it in the United States mail, correctly addressed, postage prepaid, on June 10, 2014, addressed to

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

July 12, 2014



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