

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

BANK OF WALTERBORO,)
)
Plaintiff,)

v.)

CHARLES E. BUSH aka CHARLES)
BUSH, ROSEMELLE M. SHULER,)
FIRST FAMILY FINANCIAL)
SERVICES OF GEORGIA, INC.,)
EQUIFIRST CORPORATION,)
MORTGAGE ELECTRONIC)
REGISTRATION SYSTEMS, INC.,)
As Nominee for BNC MORTGAGE,)
INC., and SOUTH CAROLINA)
DEPARTMENT OF REVENUE,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2013-CP-27-00253

RECEIVED

SEP 29 2015

SC Court of Appeals

ORDER DENYING MOTION TO
REOPEN JUDGMENT

20150929 10:03 AM
CLERK OF COURT
JUDICIAL CIRCUIT 14
COLUMBIA, SOUTH CAROLINA

This matter was referred to me by Order of Reference. This matter came before me for hearing on the Motion to Reopen Judgment filed by the Defendant, Mortgage Electronic Registration Systems, Inc., as nominee for BNC Mortgage, Inc. ("MERS"). The Plaintiff, Bank of Walterboro, has been represented by George Cone of McLeod, Fraser and Cone. MERS has been represented by Sean O'Connor of the Finkel Law Firm. MERS filed a Memorandum in Support of their Motion along with exhibits. The Plaintiff filed a Memorandum in opposition along with Affidavits and exhibits. While I gave the attorneys wide latitude in their presentations, I have not considered arguments of counsel as evidence. I do, however, recognize that assertions by an attorney are binding on their client. After consideration of all matters of record, I make the following findings

of fact and conclusions of law. Findings of fact may be conclusions of law and vice versa, where appropriate.

FINDINGS OF FACT

The underlying case here is a mortgage foreclosure on real property located in Jasper County, South Carolina, described as TMS # 062-00-05-017, located at 1519 Taylor Mill Road, Ridgeland, South Carolina (the "Property". The dispute before the Court now is between the Plaintiff, Bank of Walterboro, and MERS regarding priority of their liens. As can be seen from the caption, the number of parties and the title abstract attached to the Affidavit of Linda C. Jordan, the borrowers were taking out multiple loans and refinancing the Property often during the financial bubble of the early 2000's. Ms. Jordan's Affidavit and the attachments are part of the record and I take judicial notice of the documents referenced which are duly recorded in the Office of the Jasper County Register of Deeds and are therefore public record.

Ms. Rosemelle M. Shuler acquired title to the Property in 2001 and mortgaged it to EquiFirst Corporation shortly thereafter. In 2002, Ms. Shuler mortgaged the Property again to Option One Mortgage Corp. and this mortgage was satisfied of record in 2004. In 2003, Ms. Shuler mortgaged the Property to The CIT Group/Consumer Finance, Inc., but this mortgage was satisfied of record in 2006. Also in 2006, Ms. Shuler mortgaged the Property to Lexington Capital which assigned the mortgage to BNC Mortgage, Inc., on June 22, 2007, which then assigned the mortgage to MERS on June 25, 2007. In the meantime, Ms. Shuler mortgaged the Property to the Plaintiff, Bank of Walterboro, on March 1, 2007. The Plaintiff apparently believed it was getting a first mortgage and continued that belief for a while longer. An Affidavit by James M. Bunton, Jr., who is a

loan officer with the Bank of Walterboro, states that Plaintiff believed it had a first mortgage and relied upon a title insurance commitment from the closing attorney in reaching that belief.

Sometime afterward, the borrower defaulted on its obligations to the Plaintiff and the foreclosure process started. The Plaintiff filed this foreclosure action on May 13, 2013. The Complaint states, in pertinent part in Paragraph 12: "on information and belief, the interest of [MERS] have been paid in full and satisfied or are subordinate the interest of the Plaintiff." After the filing of the Complaint, MERS was duly served on May 28, 2013. MERS did not file any responsive pleading and an Affidavit of Default was filed on November 27, 2013. The Order of Default and Reference was filed on September 5, 2014, and Notice of the Hearing was mailed September 16 and received by MERS on September 19, 2014. That first attempted hearing was cancelled and Notice of the Rescheduled Hearing was mailed October 15 and received by MERS on October 23, 2014. That second hearing was cancelled as well. Notice of a Status Conference was given on April 23, 2015, but apparently there is no date as to when that was actually received. Notice of a third final hearing was mailed May 6, 2015, and received by MERS on May 11, 2015. The final hearing was held on May 20, 2015 and the Special Referee Decree and Notice of Sale was entered that day, filed May 21, mailed May 22, 2015, and received by MERS on May 27, 2015.

MERS does not dispute these facts and does not dispute that all of these notices were proper. MERS also does not dispute that it took no action until May 19, 2015, when a Lucita from Loan Servicing contacted the Plaintiff's attorney's office and spoke to Linda C. Jordan. The Plaintiff's attorney returned the call that day, but did not get an

answer. Lucita Sanasam sent an email to Linda C. Jordan on May 19, which Ms. Jordan forwarded to the Plaintiff's attorney on May 20. On May 20, the Plaintiff's attorney sent an email to Ms. Sanasam advising her to seek counsel immediately. Nothing happened until June 5, when the Plaintiff's attorney's office received a call from Lee Lott at (601) 351-2464 and this call was returned on June 8, 2015. The Plaintiff's attorney's office and Lee Lott spoke on June 16, 2015, Lee Lott advised that Sean O'Connor was their South Carolina counsel. Sean O'Connor called on July 7, 2015. I note that by July 7, MERS had had the Notice of Sale since May 27, 2015. I note that some of this testimony and evidence might be considered hearsay, but I consider it not for the truth of the matter asserted but to illustrate notice and the actions or inactions of the parties.

On the eve of the sale, I held a telephone conference with the attorneys for the parties, the result of which was to continue and postpone the sale until the issue of priority could be determined. MERS filed a Motion to Vacate and Set Aside Final Judgment of Foreclosure and Sale Pursuant to Rule 60, SCRPC along with a supporting Memorandum and exhibits. The Plaintiff filed a Memorandum opposing MERS' motion and attached supporting Affidavits of Ms. Jordan and Mr. Bunton along with attachments and evidence to back up said Affidavits.

Pending resolution of this dispute, I postponed the foreclosure sale. Linda C. Jordan, in her Affidavit, states that the cost to republish the Notice of Sale is \$962.00. MERS agreed to cover the cost of readvertisement, in the event I rule in the Plaintiff's favor and I would require MERS to do so anyway. The parties' attorneys have ably argued their clients' respective positions to me both in written form and in their memoranda and supporting documentation.

CONCLUSIONS OF LAW

In its Motion to Vacate, MERS relies exclusively upon Rule 60 of the South Carolina Rules of Civil Procedure. MERS relies upon both 60(a) and 60(b). MERS seeks relief from the Decree, but does not contend that any other aspect of the case is improper. I reaffirm my prior Decree in finding and concluding that the foreclosure is proper in all other respects, that all parties were duly served and that the Plaintiff is entitled to the relief it requests, saving for the issues raised by MERS in its Motion which I address in this Order. Rule 60 states, in pertinent part, as follows:

(a) Clerical Mistakes. 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 ten (10) days after the filing of the motion.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party . . .

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.

A court may relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(1) SCRPC. In determining whether a default

judgment should be set aside under Rule 60(b)(1), the Court considers (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties. *See eg. Tobias vs. Rice*, 379 S.C. 357, 665 S.E.2d 216 (S.C. App. 2008).

It may be legally significant, or it may be merely ironic, that MERS supplanted a centuries old system, and now seeks relief, because of a failure of its own system. Fortunately, I need not address that to make my ruling.

MERS arguments under 60(a) and 60(b) are similar and based upon the same facts and I treat them together. I am assuming *arguendo* that MERS has a meritorious defense. I stop short of making a specific finding to that effect, however. MERS may very likely have prevailed on the merits. I am not deciding that issue, however, and note it could conceivably be found that MERS was somehow paid off or subordinated and the mortgage was not satisfied due to a clerical error. Other than MERS' Motion and Memorandum, I have no evidence or testimony as to the current status of their mortgage, except the title abstract. I have no information as to the balance remaining. Sometimes mortgages are paid off, but not satisfied of record. That was the assumption which the Plaintiff made since 2007 and that assumption was backed up by MERS' failure to participate in the action despite repeated notice for two years. The question I must decide however, are the other elements of opening a default judgment. Defendant received the pleadings in 2013 and did not respond. It received several hearing notices for hearings that were cancelled, as well as the final hearing held before me.

Rather than arising out of mistake, inadvertence, surprise or excusable neglect, MERS' situation here arises out of their own failure to take reasonable steps to protect

their position. As recited above, MERS was given notice of the Plaintiff's claims, had numerous opportunities to appear and assert its rights and, yet, failed to do so for two years.

MERS' argument as to timeliness addresses the time between when MERS realized its problem and the time when counsel intervened. I note that MERS' attorney had a Rule 11 duty to make a reasonable inquiry as to the facts, before signing a pleading. I assume, for purposes of this analysis, that 18 or 19 days, including the Fourth of July weekend, was reasonably necessary, especially if MERS was unable or unmotivated to furnish the necessary information to its new Attorney. This argument fails, however, to address why MERS did nothing for two years after it was served with the Complaint.

On the issue of excusable neglect, MERS whole argument rests upon the explanation that it, for two years, accepted and assumed that the Complaint was accurate. This argument presumes that it was somebody else's responsibility to verify the allegations of the Complaint and not MERS' responsibility. Service of a Summons and Complaint (and Lis Pendens, in this instance) is serious business and places upon the Defendant the duty to ascertain the truth or inaccuracy of the Plaintiff's allegations, respond within 30 days or be deemed to have admitted the allegations. MERS basically ignored the Complaint and ignored the action for two years until the eve of foreclosure sale. MERS argument presupposes that MERS is not subject to the same rules as everyone else.

MERS failed to ascertain accuracy of the Complaint within the 30 days allowed by law and then for two years following service. MERS failed to attach any consequence to the multiple Notices of Hearing that it had business before this Court. MERS only

lackadaisically responded to the Decree of this Court. MERS failed to avail itself of Rule 59. I find a great measure of hubris on the part of MERS in its presumption that these notices and events were not of great importance and they should be excused for ignoring them.

MERS has not attempted to answer the obvious question "Why did you accept the Complaint as accurate for two years, but then question the Decree after a few weeks?" Had MERS done its investigation after service of the Complaint, instead of after service of the Decree, this issue would not be before the Court today. Turning briefly to MERS' argument under Rule 60(a), the only clerical error here was MERS just assuming the Complaint was accurate without any due diligence or investigation for two years.

MERS urges that my prior decision is wrong on the merits, applying real estate law. A lawsuit over real property is merely a lawsuit. The Plaintiff makes allegations in the Complaint based upon its best information and belief (which I find was done here), the Summons and Complaint are served upon the Defendant and the Defendant has 30 days to respond. In this case, MERS did not respond for two years. I note that, had MERS appeared after the 30 days to answer but prior to the entry of the Decree, it would be held to a lesser standard. The only facts before me, as to MERS, are the allegations of the Complaint, which are deemed admitted. When faced with a party in default and evidence presented by the Plaintiff showing a prima facie right to recovery, it becomes the duty of the Court to grant the relief requested.

The only issue before me is relief under Rule 60. I specifically reject MERS' characterization of priority as "irrefutable". While the recording speaks for itself, there are a number of exceptions to first-in-time-first-in-right. Other than the unsatisfied

mortgage of record, I have no evidence before me as to the current status of MERS' mortgage. I cannot, in this posture, hold that no exceptions could possibly apply. MERS has limited its position on excusable neglect, to its right to rely on the accuracy of the Complaint, and the ethical duty of an attorney to have a good faith belief in that his pleadings are supported by law and fact. Plaintiffs' attorney relies upon both the commonplace occurrence of paid, but unsatisfied, mortgages and the title opinion by the closing attorney.

The final prong of Rule 60 is the prejudice to the opposing party. I find that MERS' two year delay in asserting its rights does prejudice the Plaintiff, should I allow MERS the relief it requests. For one, the Plaintiff has incurred attorney's fees, administrative fees and costs of foreclosure that it would likely not recover should MERS be allowed to foreclose a first mortgage. MERS argues that the Plaintiff could simply make a title insurance claim or a claim against the closing attorney, but I do not accept the proposition that these claims are sure winners. MERS simply waited too long to assert its rights and the Plaintiff should be given credit for the two plus years in which it was led to believe it had a first mortgage.

CONCLUSION

MERS ignored the legal process for two years and simply waited too long to assert its rights for this Court to allow them the relief now sought. MERS has failed to show that its failure to respond to the lawsuit for two years was a result of mistake, inadvertence, surprise or excusable neglect. MERS' failure to respond to the lawsuit for two years was, rather, a direct result of their own negligence and their own hubris in

believing the South Carolina Rules of Civil Procedure do not apply to them. I find that granting MERS the relief it requests at this late hour would prejudice the Plaintiff.

IT IS HEREBY ORDERED that MERS' Motion to Reopen Judgment is DENIED.

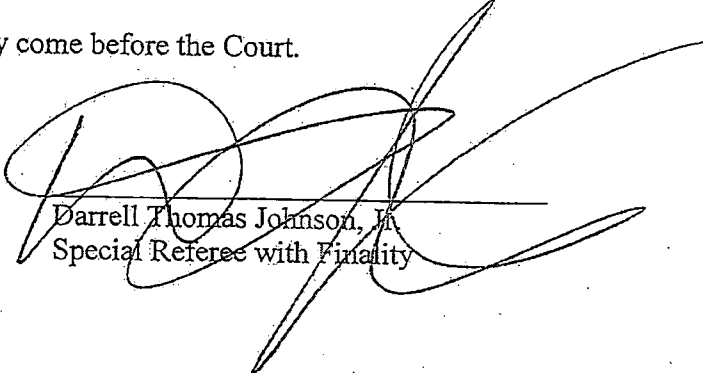
IT IS FURTHER ORDERED that I reaffirm my prior Decree of Foreclosure in this matter in its entirety.

IT IS FURTHER ORDERED that the Property shall be re-advertised for the next convenient sale date.

IT IS FURTHER ORDERED that MERS shall reimburse the Plaintiff for the cost of re-advertisement and any additional service of process in the amount of \$962.00, as agreed by MERS.

IT IS FURTHER ORDERED that I retain jurisdiction of this matter to complete the foreclosure sale, to enforce compliance with the sale and my Orders and to hear any further post judgment matters which may come before the Court.

SO ORDERED


Darrell Thomas Johnson, Jr.
Special Referee with Finality

Dated: August 25, 2015
Hardeeville, South Carolina