

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY

Ellis B. Drew, Jr., Master-in-Equity

Appellate Case No. 2015-001416

RECEIVED
OCT 28 2015
SC Court of Appeals

Deutsche Bank National Trust Company as
Indenture Trustee for MortgageIT Trust 2004-1,

Respondent,

v.

Joseph F. DeBoskey; and Suntrust Bank,

Defendants,

Of whom Joseph F. DeBoskey is the Appellant,

Appellant,

REPLY TO APPELLANT'S MOTION FOR CONTINUANCE

Magalie A. Creech (SC Bar No. 78855)
FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, South Carolina 29423
T: 843.577.5460
F: 866.800.7954
mcreech@finkellaw.com

*Attorney for Respondent Deutsche Bank
National Trust Company as Indenture
Trustee for MortgageIT Trust 2004-1*

October 26, 2015

Respondent Deutsche Bank National Trust Company as Indenture Trustee for MortgageIT Trust 2004-1, by and through its undersigned counsel, submits the herein reply to Appellant's Motion for Continuance dated October 17, 2015 ("Motion"). The Court should deny Appellant's Motion based on the following:

1. The Motion is based upon an Administrative Order of the Supreme Court which has no applicability to this matter by its own terms.

A motion for continuance is within the sound discretion of the trial court and the ruling will not be reversed without a clear showing of abuse. South Carolina Department of Social Services v. Broome, 307 S.C. 48, 413 S.E.2d 835 (1992). Respondent has moved for a supplemental hearing to update the debt figures and attorneys fees in the underlying matter. Appellant has moved for recusal of the Master in Equity. These motions are scheduled to be heard on October 28, 2015 at Appellant's specific request. On October 13, 2015, Appellant filed a motion for a continuance of the October 28, 2015 hearings, citing "personal issues" and the Supreme Court's Administrative Order 2015-10-06-01. The Master in Equity denied this motion in a written order dated October 14, 2015. See Exhibit A, Order Denying Continuance. Appellant cites the Supreme Court's Administrative Order 2015-10-06-01 in support of his argument that the Master in Equity erred in refusing to grant a continuance of the hearings scheduled on October 28, 2015. However, by its own terms, the Administrative Order was only applicable to the Term of Court scheduled for the week of October 5, 2015 in certain counties. Court proceedings during the week of October 5, 2015 were cancelled only in those counties specified within the Administrative Order, which did not include Anderson County. Moreover, all counties in this State have been operating as normal since October 12, 2015. As the pending motions were scheduled for October 28, 2015 at Appellant's specific request and because the Administrative

Order 2015-10-06-01 is in applicable to the underlying matter by its plain terms, this Court should deny Appellant's Motion.

2. This Court lacks jurisdiction over the foreclosure and thus cannot continue the motions before the trial court.

Even if the Administrative Order were applicable to the instant foreclosure, this Court lacks jurisdiction to continue the motions before the trial court because the Appellant's appeal does not stay the foreclosure.

Specifically, the Order and Judgment of Foreclosure and Sale in the underlying action was entered on September 17, 2012. Appellant filed a Motion for Relief from said Judgment of Foreclosure on October 23, 2013, which was denied by the Master in Equity as untimely and procedurally defective. See Exhibit B, Order Denying Appellant's Motion for Relief. Appellant filed a Notice of Appeal of the Order Denying Appellant/Defendant's Motion for Relief on June 27, 2015, which is pending before this Court. However, Appellant never moved for reconsideration of the Judgment of Foreclosure, and the time for appeal of that Order has expired. See Godfrey v. Heller, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993) (holding an issue was not preserved when the party failed to raise the issue in a Rule 59(e) motion to alter or amend the judgment); Rule 203(a), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.")

Moreover, the South Carolina Supreme Court has ruled that the execution of a judgment is not generally stayed by the denial of a Rule 60(b), SCRPC motion because the denial of such a motion grants "no relief" to the movant so that there is nothing to stay. C-sculptures Llc v. Brown, 393 S.C. 27, 31,709 S.E.2d 705, 707 (S.C. App., 2011) (citing Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 375 S.C. 423, 426, 653 S.E.2d 274, 276 (2007)). See also Stearns Bank

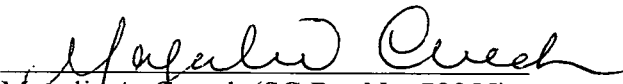
v. Glenwood Falls, 375 S.C. 423, 653 S.E.2d 274, 276 (S.C., 2007) (“An appeal from a 60(b) denial does not stay the original judgment. The filing of a Rule 60(b) motion “does not affect the finality of a judgment or suspend its operation.” If the debtor wishes to stay enforcement of the judgment pending the trial court's disposition of the debtor's Rule 60(b) motion, the burden is on it to make the motion under Rule 62(b), SCRCP.”) (internal citations omitted); Raby Const., LLP v. Orr, 358 S.C. 10, 594 S.E.2d 478 (S.C., 2004) (“The order of foreclosure which directed the sale of the property is simply not a matter that was stayed by the appeal of the denial of the Rule 60(b) motion; it was a separate order which Orr did not appeal. Thus, the award of additional attorneys’ fees, which was requested pursuant to that former order, was within the trial court's jurisdiction.”); Williams v. Condon, 347 S.C. 227, 251, 553 S.E.2d 496, 509 (Ct. App. 2001) (Shuler, J., dissenting) (recognizing “motions made pursuant to Rule 60, SCRCP do not affect the finality of the judgment under attack and thus do not toll the time for appeal”).

Finally, in its Order of Continuance entered June 24, 2015, the Master in Equity noted that Appellant had filed an appeal of the trial court’s June 3, 2015 Order denying Appellant’s Motion for Relief, but had not posted an appeal bond with the court. See Exhibit C, Order of Continuance. The trial court conditioned its issuance of a continuance on the posting of the required appeal bond. See Parker v. Shecut, 349 S.C. 226, 231, 562 S.E.2d 620 (S.C., 2002) (“[J]udgments directing the sale of real property are not automatically stayed on appeal. See Rule 225, SCACR; S.C.Code Ann. § 18-9-170 (1985)”); South Carolina Nat. Bank v. Devine Blossom, 321 S.C. 110, 113, 467 S.E.2d 767, 769 (Ct. App., 1996) (“Moreover, while S.C. Code Ann. §§ 18-9-130 and 18-9-170 provide, respectively, that execution of a money judgment or an order directing the sale of property may be stayed by court order upon the posting of a bond, it is undisputed the appellants never moved for an order staying the execution of judgment in this

case and never posted the required bond. It follows that none of the matters actually decided in the master's order granting foreclosure were stayed by appellants' appeal.”). No bond has been posted by Appellant in this matter.

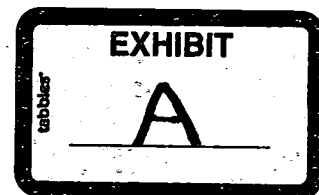
For all the foregoing reasons, this Court lacks jurisdiction over the underlying foreclosure and Appellant’s Motion should be denied.

Respectfully submitted,


Magalie A. Creech (SC Bar No. 78855)
FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, South Carolina 29423
T: 843.577.5460
F: 866.800.7954
mcreech@finkellaw.com

October 26, 2015

*Attorney for Respondent Deutsche Bank
National Trust Company as Indenture
Trustee for MortgageIT Trust 2004-1*



STATE OF SOUTH CAROLINA)
)
COUNTY OF Anderson)

IN THE COURT OF COMMON PLEAS

Civil Action Number: 2011-CP-04-03316

Deutsche Bank National Trust Co. as)
Indenture Trustee for Mortgage IT Trust)
2004-1,)
Plaintiff,)
Vs.)
Joseph F. DeBoskey, et al)
Defendant(s).)
_____)

ORDER DENYING DEFENDANT
Joseph F. DeBoskey's
MOTION FOR CONTINUANCE

The Court after specific request of the Defendant scheduled a hearing on his Motion for Wednesday, October 28th, 2015 at 11:00 a.m. The Order of October 6, 2015 referred to by the Defendant does not include Upstate Counties, Anderson, Oconee, Pickens, Greenville, etc.


Therefore, I do not see any reason to grant a continuance based on recent hazardous weather conditions.

I therefore expect the Defendant, Joseph F. DeBoskey to appear at the hearing scheduled at his specific request on Wednesday, October 28, 2015 at 11:00 a.m., Anderson County Courthouse, 100 South Main Street, Third Floor, Courtroom #2, Anderson SC 29624.

It is so Ordered.

October 14, 2015

Anderson, South Carolina



Ellis B. Drew, Jr.
as Master in Equity

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Deutsche Bank National Trust Company as
Indenture Trustee for MortgageIT Trust 2004-
1,

PLAINTIFF,

vs.

Joseph F. Deboskey; and SunTrust Bank,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2011-CP-04-3316

JUN - 3 2015

ORDER DENYING
DEFENDANT JOSEPH F. DEBOSKEY'S
MOTION FOR RELIEF
FROM JUDGMENT

COMMON PLEAS AND
GENERAL SESSIONS

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This matter came before the Court for a hearing on May 12, 2013 on a Motion for Relief from Judgment and Dismissal of Action filed by Defendant Joseph F. Deboskey ("Deboskey" or "Defendant"). Deboskey was represented by attorney Marshall P. Sherard, Jr. Plaintiff Deutsche Bank National Trust Company ("Deutsche Bank" or "Plaintiff") was represented by attorney Sean A. O'Connor. For the reasons set forth herein, Deboskey's motion is denied.

I. PROCEDURAL HISTORY

This is an action for foreclosure on real property. The monthly payments due on the subject note and mortgage have been in default since May 1, 2011. The Summons, Lis Pendens, Complaint, and Notice of Foreclosure Intervention were filed November 10, 2011. Defendant was served November 14, 2011. Plaintiff served Defendant a Denial of Foreclosure Intervention pursuant to S.C. Supreme Court Administrative Order 2011-05-02-01 on January 18, 2012, due to Defendant's failure to respond to the Notice of Foreclosure Intervention within thirty days. Thereafter, Defendant served Plaintiff a Motion for More Definite Statement pursuant to Rule 12(e), SCRPC on February 3, 2012, which was denied at a hearing held on May 11, 2012. A

Certification of Compliance with S.C. Supreme Court Administrative Order 2011-05-02-01 was filed on February 21, 2012.

Pursuant to Order entered on June 11, 2012, the matter was referred to the Master in Equity for Anderson County. Plaintiff filed an Affidavit of Non-military Service and Default for Defendant on August 13, 2012, based on his failure to serve an Answer to the Complaint. An Order and Judgment of Foreclosure and Sale was entered on September 17, 2012. Defendant filed the instant Motion on October 23, 2013.

II. STANDARD

A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. Bowers v. Bowers, 304 S.C. 65, 67 403 S.E.2d 127, 129 (Ct. App. 1991). Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Coleman v. Dunlap, 306 S.C. 491, 494 413 S.E.2d 15, 17 (1992). Rule 60, SCRPC, is entitled "Relief from Judgment or Order," and subsection (b) states in pertinent part as follows:

- (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;
 - (4) the judgment is void;
 - (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

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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.

Rule 60(b), SCRCP. (Emphasis added).

III. FINDINGS AND CONCLUSIONS OF LAW

The Court finds as a threshold matter that Defendant's Motion is procedurally defective on two grounds. First, it fails to cite any rule of civil procedure upon which the Motion is purportedly based; second, the Motion was made more than one year after the final judgment was entered on September 17, 2012. Because a request for relief from a final judgment or order must be made upon motion pursuant to Rule 60, SCRCP, Defendant's motion should be denied. Furthermore, the Motion must be denied because it violates the express one-year deadline within which a party must make a Motion pursuant to Rules 60(b)(1), (2), and (3) SCRCP.¹

Significantly, Defendant's Motion is devoid of *any* allegations which would warrant relief from judgment pursuant to Rule 60, SCRCP and its subparts. Instead, Defendant's Motion appears to be based on a request for equitable relief pursuant to the S.C. Supreme Court Administrative Order 2011-05-02-01 ("Administrative Order"). However, Defendant did not respond to the Denial of Foreclosure Intervention or otherwise object to the Certification of Compliance with the Administrative Order filed on February 21, 2012. The Administrative Order does not provide a defaulting party with any additional mechanism through which relief from entry of judgment can be obtained, or otherwise alter the South Carolina Rules of Civil Procedure. The time for Defendant to object to or otherwise challenge Plaintiff's compliance with the Administrative Order has long passed, and there is simply no basis under Rule 60, SCRCP to set aside the judgment. Because Defendant has not cited, and cannot cite, any of the

¹ Defendant's Motion does not allege that the judgment is void; therefore Rule 60(b)(4) would not serve as possible grounds for the motion. Similarly, Defendant Motion does not allege any of the Rule 60(b)(5), SCRCP grounds for relief are applicable.


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Rule 60(b) grounds for relief, nor has he alleged that the judgment is void, the instant Motion must be dismissed as untimely.

III. CONCLUSION

Defendant Motion is procedurally defective, as it was filed outside the applicable one-year deadline after entry of final judgment. Accordingly the Motion must be, and is hereby, denied. Further, even if it had been timely filed, the Motion fails as a matter of law because the S.C. Administrative Order of 2011 does not provide Defendant any additional grounds upon which to seek relief from the judgment in this action. Accordingly the Motion must be, and is hereby, denied.

IT IS SO ORDERED!

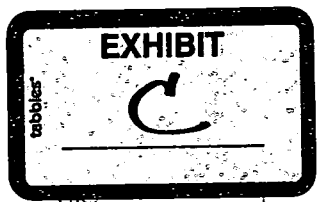


Ellis B. Drew, Jr.
Master-in-Equity
County of Anderson

 2015

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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Deutsche Bank National Trust Company as
Indenture Trustee for Mortgage Trust 2004-1,

PLAINTIFF,

vs.

Joseph F. Deboskey; and SunTrust Bank,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
C/A NO: 11-CP-04-3316

(NON-JURY MORTGAGE FORECLOSURE)


ORDER OF CONTINUANCE

On September 17, 2012, this Court issued its Order and Judgment of Foreclosure and Sale, which was filed on September 17, 2012. By Order filed June 3, 2015 this Court denied the Defendant Joseph Deboskey's ("Deboskey") motion for relief from the final judgment filed on September 17, 2012. A supplemental hearing was scheduled and held on July 6, 2015 for the sole purpose of updating the judgment debt and re-scheduling the foreclosure sale. This Court and Plaintiff have now been made aware that by petition dated June 27, 2015, Deboskey has filed an appeal of the June 3, 2015 Order denying his motion; however, Deboskey has not posted an appeal bond as required by South Carolina Appellate Rule 241 and S.C. Code. Ann. § 18-9-170.

THEREFORE IT IS ORDERED that this matter is continued provided that within 10 days of service of this order Defendant Deboskey posts the required appeal bond pursuant to Appellate Rule 241 and S.C. Code. Ann. § 18-9-170 in an amount of no less than 125% of the outstanding debt which, as of July 6, 2015, was \$229,936.54.

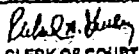
IT IS FURTHER ORDERED that should Deboskey fail to post the required bond within the 10 days provided, this Court, if so requested by Plaintiff, will advertise and sell the subject property pursuant to the Order and Judgment of Foreclosure and Sale filed September 17, 2012 as allowed by law.

IT IS SO ORDERED.


Ellis B. Drew, Jr.
Master in Equity, Anderson County

Anderson, South Carolina
July 20, 2015

Exhibit 1

A TRUE COPY
SEP 15 2015

CLERK OF COURT

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ANDERSON SC
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COMMON PLEAS AND
GENERAL SESSIONS

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY

Ellis B. Drew, Jr., Master-in-Equity

Appellate Case No. 2015-001416

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Respondent,

v.

Joseph F. DeBoskey; and Suntrust Bank,

Defendants,


Of whom Joseph F. DeBoskey is the Appellant,

Appellant,

PROOF OF SERVICE

I hereby certify that I have served the Respondent's *Reply to Appellant's Motion for Continuance* upon Appellant Joseph F. DeBoskey by depositing a copy of it in the United States Mail, postage prepaid, on October 26, 2015, to his address at 115 Caribou Cove, Anderson, South Carolina 29621.

(SIGNATURE PAGE FOLLOWS)


Magalie A. Creech (SC Bar No. 78855)
FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, South Carolina 29423
T: 843.577.5460
F: 866.800.7954
mcreech@finkellaw.com

*Attorney for Respondent Deutsche Bank
National Trust Company as Indenture
Trustee for MortgageIT Trust 2004-1*

October 26, 2015

FINKEL LAW FIRM LLC

VIRGINIA S. SPENCER
VSPENCER@FINKELLLAW.COM

October 26, 2015

REPLY TO:
CHARLESTON LITIGATION

RECEIVED

OCT 28 2015

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

**Re: Deutsche Bank National Trust Company as Indenture Trustee for
MortgageIT Trust 2004-1 v. Joseph F. DeBoskey and Suntrust Bank
Appellate Case No.: 2015-001269
Our File No.: 70680.47496**

Dear Ms. Kitchings:

Enclosed please find a *Reply to Appellant's Motion for Continuance* and the related *Proof of Service* which needs to be filed on connection with the above referenced matter. We respectfully request that you file-stamped same and return to our office in the enclosed envelope.

By copy of this letter, I am providing same to all interested parties.

If you have any questions or concerns, please contact me at your convenience.

With kind personal regards, I am

Sincerely,



Virginia S. Spencer

:VSS
Enclosure

cc: Joseph F. DeBoskey (w/encl.)
The Hon. Ellis B. Drew (w/encl.)

COLUMBIA
1201 Main Street, Suite 1800
Post Office Box 1799 (29202)
Columbia, SC 29201
Tel: (803) 765-2935
Fax: (803) 252-0786

CHARLESTON
Litigation, Real Estate & REO
4000 Faber Place Drive, Suite 450
Post Office Box 41489 (29423)
North Charleston, SC 29405
Tel: (843) 577-5460
Fax: (843) 577-5135

CHARLESTON
Foreclosure
4000 Faber Place Drive, Suite 450
Post Office Box 71727 (29415)
North Charleston, SC 29405
Tel: (843) 577-5460
Fax: (843) 725-0015