

COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEE

CIVIL ACTION NO.: 2009-CP-31-0131

United States of America, acting through the
Farmers Home Administration, United
States Department of Agriculture,

Plaintiff,

vs.

Maxie Lee Thomas, Jr. a/k/a Maxie Lee
Thomas, deceased, and all other heirs at law
and/or distributees of Maxie Lee Thomas, Jr.
a/k/a Maxie Lee Thomas, deceased, his
heirs, personal representatives, executors,
administrators, successors and assigns, and
any spouses if any he has, and all persons
entitled to claim under or through him or any
of them; all persons unknown claiming any
right, title, estate, interest in or lien upon the
real estate described in the Complaint herein;
also any persons who may be in the military
service of the United States of America, being
a class designated as John Doe; and any
unknown minors or persons under a disability
being a class designated as Richard Roe;
Laura Ann Toney; and Brittany Nichol Thomas,

Defendants.

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SC Court of Appeals

ORDER DENYING AMENDED
NOTICE OF EX-PARTE APPLICATION and
EX-PARTE APPLICATION TO VACATE
ORDER

THIS MATTER came before the Court on October 1, 2015 on the Defendant Laura Ann Toney's Amended Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order ("Amended Motion to Vacate"). Appearing at the hearing was Taylor A. Peace, Esq., attorney for Plaintiff. The Court notified Defendant Laura Ann Toney ("Toney") of the time and place of the hearing and Plaintiff provided her a Notice of Hearing stating same; however, neither Toney nor her representative appeared. Based on the Amended Motion to Vacate, statutory law, case law, and such other and further argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about September 19, 2013, Plaintiff filed a Notice of Motion and Motion to Dismiss Jury Trial Demand of Defendant Laura Ann Toney (hereinafter "Motion to Dismiss Jury Demand").
2. On October 31, 2013, Plaintiff filed a Notice of Motion and Motion for Summary Judgment as to Defendant Laura Ann Toney's Counterclaims (hereinafter "Motion for Summary judgment").
3. On or about March 21, 2014, a hearing on the Motion for Summary Judgment and Motion to Dismiss Jury Demand was held, and same was attended by Donald W. Tyler, Jr., Esq., attorney for Plaintiff, and Toney, who appeared *pro se*.
4. Prior to the March 21, 2014 hearing, Toney provided no affidavit or other evidence in opposition to the Motion for Summary Judgment.
5. On January 5, 2015, the Court informed Plaintiff and Toney that it was granting the Motion for Summary Judgment and Motion to Dismiss Jury Demand, gave reasons for the decision, and asked Plaintiff's counsel to draft a proposed order reflecting same.
6. On January 16, 2015, Plaintiff's counsel delivered to Nelson Russell Parker, Jr., former clerk for the undersigned ("Parker"), by electronic mail, a proposed Order Granting Plaintiff's Motion for Summary Judgment and Motion to Dismiss Jury Demand ("Order Granting Summary Judgment").
7. Plaintiff's counsel did not deliver to Toney a copy of the proposed Order Granting Summary Judgment at the same time and by the same means as it was provided to Parker since he did not have an electronic mail address for Toney.
8. On March 26, 2015, the Court signed the proposed Order Granting Summary Judgment, and same was filed with the Clerk of Court for Lee County on March 26, 2015.
9. Plaintiff's counsel delivered a copy of the filed Order Granting Summary Judgment to Toney, who responded by filing a Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order ("Motion to Vacate") on April 8, 2015.

10. The Motion to Vacate alleges Plaintiff's counsel did not deliver the proposed Order Granting Summary Judgment to her at the same time and in the same manner as it was provided to the court, and it should be vacated as a result. The Motion also alleges Toney is entitled to damages.

11. On April 10, 2015, Parker received, by electronic mail, a communication from Plaintiff's counsel proposing two resolutions to the Motion to Vacate ("April 10, 2015 E-mail").

12. The two resolutions set forth in the April 10, 2015 E-mail were:

- a. That the Order Granting Summary Judgment be vacated, Toney be given fourteen (14) days to propose changes and provide comment to same, that said changes and/or comments be approved and/or rejected by the Court and any and all approved changes be incorporated into an amended Order Granting Summary Judgment; or
- b. That Toney be given fourteen (14) days to propose changes and/or comments to the Order Granting Summary Judgment and the Court issue an amended Order Granting summary Judgment based on same.

13. The April 10, 2015 E-mail states that it was being sent to Toney by certified mail, return, receipt requested.

14. Neither Plaintiff's counsel nor the Court received any communication from Toney until the filing of the Amended Motion to Vacate on April 23, 2015.

15. The Amended Motion to Vacate acknowledged that Toney received the April 10, 2015 e-mail by certified mail.

CONCLUSIONS OF LAW

Based on the Findings of Fact set forth above, the Court finds and concludes as follows:

1. This Court has subject matter and personal jurisdiction over the parties and venue is proper.
2. Based on the language of the Amended Motion to Vacate, same was filed pursuant to the Rule 59(e), SCRPC and Rule 60(b), SCRPC.
3. Pursuant to Rule 59(e), SCRPC, a motion to alter or amend the judgment shall be served no later than ten (10) days after receipt of written notice of the entry of the order. Rule 59(e), SCRPC.

4. Under South Carolina law, "[u]nless otherwise ordered by the court because of numerous defendants or other parties, all (1) written orders ... shall be served upon each of the parties of record" pursuant to Rule 5(a), SCRCP.

5. Relatedly, "[a]ny party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any matter pending shall serve the same on all counsel of record at the same time and by the same means" pursuant to Rule 5(b)(3).

6. However, *ex parte* communication resulting from a trial judge signing proposed order drafted by opposing counsel, but not sent to the opposing party is not a reversible error as long as the record does not reflect partiality or prejudice. See e.g. Grant v. South Carolina Coastal Council, 319, S.C. 348, 356, 461 S.E.2d 388, 392 n.5 (1995) (citing Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880, (1993)).

7. As applied to this matter, Toney has alleged that Plaintiff violated Rule 5, SCRCP, by not sending her a copy of the proposed Order for Summary Judgment at the same time and by the same means and it was provided to the Court.

8. However, the Court notified Toney and Plaintiff of its decision with regard to the Order for Summary Judgment, and she was on notice of and had knowledge of same.

9. Also, Toney has failed to present evidence that the record reflects that the Court exhibited partiality towards Plaintiff or that she has been prejudiced in any way.

10. Accordingly, Toney has failed to show that the Order Granting Summary Judgment should be altered or amended pursuant to Rule 59(e), SCRCP.

11. Regarding Rule 60(b), SCRCP, "[o]n motion and upon such terms as are just, the court may relieve a party ... 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". Rule 60(b), SCRCP.

12. Lack of fairness is not a ground for relief from judgment. Gainey v. Gainey, 382 S.C. 414, 431 675 S.E. 2d 792, 801. (S.C. Ct. App. 2009).

14. Although most often used when relief is sought from a judgment by default, Rule 60(b)(1) applies to any final judgment. RRR, Inc. v. Toggas, 378 S.C. 174, 182 662 S.E. 2d 438, 442 (S.C. Ct. App. 2008) (citing Goodson v. Am. Bankers Ins. Co. of Fla, 295 S.C. 400, 402, 368 S.E. 2d 687, 689 (S.C. Ct. App. 1988)).

15. In determining whether to grant relief from judgment based on mistake, inadvertence, surprise or excusable neglect, the court must consider the following factors: (1) the promptness with which the relief is sought, (2) reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice of the other party. Rouvet v. Rouvet, 388 S.C. 301, 309, 696 S.E. 2d 204, 208 (S.C. Ct. App. 2010).

16. Regarding Rule 60(b)(3), SCRCP, "extrinsic fraud is the only type of fraud for which relief may be granted under Rule 60(b)(3)". Gainey v. Gainey, 382 S.C. 414, 425, 675 S.E. 2d 792, 798 (S.C. Ct. App. 2009) (citing Raby Const., L.L.P. v. Orr, 358 S.C. 10, 20, 594 S.E. 2d 478, 483 (2004)).

17. Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard". Id (citing Hilton Head Ctr. Of S.C. v. Public Serv. Commn., 294 S.C. 9, 11, 362 S.E. 2d 176, 177 (1987)).

18. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action. Id.

19. As applied to this matter, Toney has failed to present any evidence of mistake, inadvertence, surprise or excusable neglect pursuant to Rule 60(b)(1), SCRCP or the factors to be considered when deciding same.

20. Rather, Toney was aware and had knowledge of the Court's decision with regard to the Order for Summary Judgment.

21. Toney also failed to present any evidence of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)" as none was presented at the hearing on the Amended Motion to Vacate. Rule 60(b)(2), SCRCP.

22. Regarding Rule 60(b)(3), SCRCP, Toney has failed to show any evidence of fraud, extrinsic or otherwise, misrepresentation, or that Plaintiff or it's counsel participated in misconduct. Rule 60(b)(3), SCRCP.

23. To the extent the Amended Motion to Vacate makes allegations of *ex parte* communication or a violation of Rule 5, SCRCP, Toney was informed by the Court of its decision with regard to the Motion for Summary Judgment, and she has made no complaint, proposed amendment, or proposed alteration concerning same.

24. Toney has further shown no evidence that she has been deprived of an opportunity to be heard, or present her case or that there has been misconduct by an adverse party.

25. Additionally, has failed to show any evidence that the Order for Summary judgment is void or that it has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated. Rule 60(b)(4), SCRCP.

26. Furthermore, Toney has failed to show that it is no longer equitable that the Order for Summary Judgment should have prospective application. Rule 60(b)(5), SCRCP.

27. Accordingly, Toney has failed to present evidence any evidence that the Order for Summary Judgment should be altered or amended under Rule 59(e), SCRCP or vacated under Rule 60(b), SCRCP.

RULE 59(e) and RULE 60(b) STANDARD

Under South Carolina law, the decision of whether to grant a motion made under Rule 59(c) and Rule 60(b), SCRCP is left to the sound discretion of the trial court. Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 723 S.E. 2d 835 (S.C. Ct. App. 2012). Also, the party bringing the motion has the burden of presenting evidence proving the facts essential to entitle him/her to the requested relief. See McClurg v. Deaton, 380 S.C. 563, 671 S.E. 2d 87 (S.C. Ct. App. 2008);

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Toney's Motion to Vacate is hereby denied.

Toney failed to show that any alleged *ex parte* communication or alleged violation of Rule 5, SCRCP regarding the delivery of the Order for Summary Judgment caused her prejudice, nor has she shown any evidence

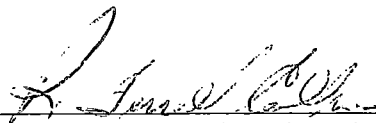
of partiality on the party of the Court towards Plaintiff. Additionally, the Court communicated to Toney its decision with regard to the Motion for Summary Judgment and Motion to Dismiss Jury Demand and she was informed of same prior to the entry of the Order for Summary Judgment. Accordingly, she has failed to show evidence that the Motion to Vacate should be granted under Rule 59(e), SCRPC.

Additionally, Toney has failed to present evidence that the Amended Motion to Vacate should be granted under Rule 60(b). In particular, she has failed to show any evidence of any mistake, inadvertence, surprise, or excusable neglect. She has also failed to show any newly discovered evidence. Furthermore, she has failed to show any evidence that Plaintiff perpetrated fraud, extrinsic or otherwise, misrepresentation or that Plaintiff participated in misconduct. Additionally, she has failed to show that the Order for Summary Judgment is void, satisfied, released, discharged, or that it would no longer be equitable for it to have prospective application. It is therefore,

ORDERED, ADJUDGED, and DECREED, that the Amended Motion to Vacate is hereby denied.

IT IS FURTHER ORDER, ADJUDGED, and DECREED, that the Order for Summary Judgment have full force and effect, and that, upon the entry of this Order, Plaintiff may proceed with its foreclosure action.

IT IS SO ORDERED.



Honorable R. Ferrell Cothran, Jr.
Lee County Court of Common Pleas

October 22, 2015
Manning, South Carolina