

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

U.S. Bank National Association, as trustee, in trust for registered holders of First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-FF1,

Plaintiff,

v.

Mac Arthur Day; Americredit Financial Services, Inc.;

Defendant(s).

(714297-00298)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2015-CP-28-00494

ORDER

RECEIVED

SEP 23 2016

SC Court of Appeals

FILED FOR RECORD  
2016 SEP 13 AM 11:19  
JOYCE McDONALD  
CLERK OF COURT  
KERSHAW COUNTY, S.C.

This matter came before the Court on September 7, 2016 for consideration of Defendant Mac Arthur Day's (the "Defendant") "Emergency Motion to Stay" (the "Motion"). Present at the hearing were Jason D. Wyman, counsel for the Plaintiff, Defendant Mac Arthur Day, and Mouader Day. Though inartfully plead, the Court construed the Defendant's Motion as one seeking relief under Rule 60(b) of the South Carolina Rules of Civil Procedure. After careful consideration of the law, pleadings, and arguments of parties, the Court respectfully denies the Defendant's Motion.

PROCEDURAL HISTORY

This lawsuit arises out of the foreclosure of a residential real estate mortgage. On May 26, 2015, Plaintiff filed a Lis Pendens, Summons, and Complaint seeking foreclosure of the Defendant's Mortgage. Defendant was properly served as evidenced by the Affidavit of Service contained in the record. Despite being properly served, Defendant failed to answer or otherwise

ATTEST  
Copy of Original on File in this Court  
*Joyce McDonald*  
Clerk of Court Kershaw County

*JH KD*

respond to the Summons and Complaint and was held in default. On September 11, 2015, the Court held a hearing and a Master In Equity's Order and Judgment of Foreclosure and Sale was entered on September 15, 2015 (the "Original Judgment"). Despite being notified of the hearing, Defendant failed to appear at the September 2015 hearing. Following the entry of the Original Judgment, the foreclosure sale was canceled due to inclement weather. A Supplemental Hearing was then held on March 8, 2016 for the purpose of updating the total amount of the debt and setting the foreclosure sale date. Despite being notified of the supplemental hearing, Defendant failed to appear. On March 8, 2016, a Supplemental Master in Equity's Report and Judgment of Foreclosure and Sale was filed and the property was scheduled to be sold at public auction on May 2, 2016. On May 2, 2016, a foreclosure sale was held and the Plaintiff was the successful bidder in the amount of \$160,676.46. On May 19, 2016, the undersigned executed a Master in Equity's Foreclosure Deed conveying the subject property to the Plaintiff. The Foreclosure Deed was recorded on June 1, 2016 in the Register of Deeds Office for Kershaw County. On July 11, 2016, the undersigned executed a Writ of Assistance based on the review of the file and the fact that Plaintiff was entitled to possession of the subject property. The Writ of Assistance authorized the Sheriff of Kershaw County to enter upon the property and remove all person and their possession and to put the Plaintiff in full, peaceful and quiet possession of the property. Following the issuance of the Writ of Assistance, Defendant filed an Emergency Motion to Stay, which is the subject of this Order.

#### DISCUSSION

##### **A. Defendant's Emergency Motion to Stay**

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Defendant filed an Emergency Motion to Stay to stop the scheduled eviction.

Defendant's Motion raised issues regarding the underlying foreclosure and argued that fraud had been committed. Based on a liberal reading of the Motion, the Court construed it as one under Rule 60(b) of the South Carolina Rules of Civil Procedure.

In determining whether to grant a motion under Rule 60(b), the court should consider: (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 party. *BB & T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006); *Micronics, Inc. v. South Carolina Dept. of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). Relief from judgment pursuant to Rule 60(b) lies within the sound discretion of the trial judge. *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004).

A party may seek relief from a default judgment for mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or other misconduct, where the judgment is void, or where the judgment has been satisfied. Rule 60(b), SCRCPP. "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." *BB&T, supra; Lanier v. Lanier*, 364 S.C. 211, 215, 612 S.E.2d 456, 458 (Ct. App. 2005). The party requesting such relief has the burden of making a "particularized showing" by proving it through clear and convincing evidence, usually through affidavits. *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 494, 713 S.E.2d 335, 339 (Ct. App. 2011); *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991). Finally, the standard for relief under Rule 60(b) has been characterized as "rigorous." *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

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In the present case, the Court finds that Defendant has failed to carry his burden in establishing that he is entitled to relief from entry of the judgment of foreclosure and sale. First, the Defendant failed to make an appearance in this case until September 2016, approximately fifteen months after this case was filed. Moreover, Defendant had ample opportunity to appear at the two scheduled foreclosure hearings in this case but failed to do so. Secondly, Defendant has failed to satisfy the Court that he has a meritorious defense to the foreclosure action. Based on a review of the record, the Court is satisfied that the foreclosure was properly granted. *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009) (“Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt.”) Finally, the Court finds that Plaintiff would suffer extreme prejudice should the relief be granted in that multiple hearings have been held in this matter and the property has already went to judicial sale. Plaintiff should not be forced to needlessly continue litigation in this matter.

#### CONCLUSION

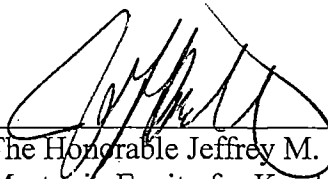
#### **NOW, THEREFORE, IT IS ORDERED THAT:**

1. Defendant's Emergency to Stay is Denied.
2. Plaintiff is entitled to recover possession of the below described property and it is further that, upon service of a copy of this Order, the Sheriff of Kershaw County, South Carolina or his authorized deputies be and are hereby directed and authorized to enter upon the property, by force if the same be necessary, on the 12<sup>th</sup> day of October, 2016, at 9:00 o'clock a.m. or as soon thereafter as practical, and seize the said property and to remove therefrom any and all such persons including the Occupants who may be occupying the same, together with all their possessions, and to put the Plaintiff in full, peaceful and quiet possession of the property without delay, and thereafter make immediate Return to the undersigned showing how this Order has been executed.

*[Handwritten signature]*

3. In the event Defendant appeals the decision of this Court, the bond amount to be posted is \$160,676.46.

**AND IT IS SO ORDERED!**

  
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The Honorable Jeffrey M. Tzerman  
Master in Equity for Kershaw County

Cantor, South Carolina

Dated: September 17, 2016

*W*