

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-15-00166

Deutsche Bank National Trust Company, as)
Trustee of IndyMac Residential Mortgage-)
Backed Trust Series 2006-L2, Residential)
Mortgage-Backed Securities, Series 2006-12))

Plaintiff(s))

ORDER DENYING MOTION TO
CLARIFY ORDER AND/OR
FOR RULE 60 RELIEF

vs.)

Adriana P. Lesemann and Charles S.)
Lesemann, et al.,)

Defendant(s).)

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SC Court of Appeals

THIS MATTER was before the Court on plaintiff Deutsche Bank National Trust Company's Motion to Clarify and/or for Rule 60 Relief filed September 29, 2016. The Court conducted a hearing on this Motion on November 28th, 2016 in Walterboro, South Carolina. Vance Brabham, III appeared for the plaintiff, and David Haller appeared for the defendants. The motion seeks to clarify that the order of this Court dated October 1, 2015 dismissing this action for failure to prosecute was without prejudice. Alternatively, Deutsche Bank seeks relief from the judgment under Rule 60 to change the dismissal to without prejudice. For the reasons set forth herein, the motion is denied.¹

FACTUAL BACKGROUND

This is a foreclosure action brought by plaintiff Deutsche Bank on a vacant lot in Colleton County. It filed its complaint on March 6, 2012. Defendants Adriana P. Lesemann and Charles S. Lesemann answered the complaint on September 25, 2012. Counsel for the plaintiff filed its

¹ Plaintiff attempted to argue that the Order could be amended pursuant to Rule 60(a); however, it failed to state this as a grounds for the motion it filed on September 29, 2016 and the issue is not before me.

Certificate of Compliance with Foreclosure Intervention on August 25, 2012. Thereafter, the parties exchanged discovery. The last filing in the case was a consent order to refer the case for trial to a special referee in January 12, 2015. In the almost three years the case was pending, there were no filings beyond the complaint, answer, and reference.

This action was dismissed on October 1, 2015. Prior to entering the Order, this Court twice warned the plaintiff in writing that failure to take some action to end the case would lead to dismissal. The order of dismissal finds and hold as follows:

Case dismissed for want of prosecution and failure to appear. A letter was sent by Judge Buckner giving the parties 90 days to file a final Order in the case in April 2015. Another letter was sent in September 2015 setting a Rule to Show Cause hearing for 10am October 1, 2015. No one appeared when the case was called.

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The form order indicates that the Clerk of Court mailed the order to two lawyers for the plaintiff in two separate offices, one in Greenville and one in Atlanta. It is not disputed that these lawyers received the order dismissing the case and that both were counsel of record, neither having moved or been relieved as counsel.² Despite having six months notice of the need to act and having received the order of dismissal, plaintiff took no steps to reopen the case, clarify the position of it, notify the Court of the case's posture, file an appeal, or otherwise protect its rights.

In April of 2016, the plaintiff, through different counsel, filed a complaint alleging the exact same claims as were alleged in this action. See Case No. 2016-CP-15-00414. Defendants moved to dismiss the 2016 action on the basis of the October 1, 2015, order. Judge Mullen heard that motion on August 10, 2016 and referred it to me as it involved an interpretation of my order.

² Plaintiff argued through counsel at the hearing that its counsel of record at the time (who remains counsel of record as of this order), was seeking to withdraw as counsel. The plaintiff failed to produce any record to support this contention.

Still, plaintiff waited until September 29, 2016, nearly a year after the case was dismissed to file this motion.

The plaintiff did not support the motion with an affidavit or any other record. At the hearing, plaintiff's current counsel indicated that one of the plaintiff's lawyer's law firms determined to stop doing business in South Carolina. It was unclear what the second lawyer, who is based in South Carolina, was doing. Neither lawyer has been relieved as counsel as of this motion.

LAW/ANALYSIS

Dismissals of an action for failure to prosecute is governed by Rule 41(b), SCRPC. It provides:

(b) Involuntary Dismissal: Non-suit; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

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The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). **Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits.**

Plaintiff requests the court clarify the October 1, 2015 order to state that the dismissal was not an adjudication. For the following reasons, the motion is denied.

The plaintiff asks for relief from the judgment dismissing the action pursuant to Rule 60(b), SCRPC. However, Rule 60 relief is not available to the plaintiff because it could have appealed the October 1, 2015 order and did not do so. *Tench v. Dept. of Education*, 347 S.C. 117, 553

S.E.2d 451 (2001). In *Tench*, the parties stipulated to resolve a legal question by the trial court's resolution of a motion to dismiss, which the trial court treated as one for summary judgment. The Department of Education lost the motion and appealed. The Court of Appeals dismissed the appeal, finding it interlocutory because it was an appeal of a motion to dismiss. The Department then filed a motion under Rule 60, which was granted. *Tench* appealed. The Supreme Court vacated the order granting Rule 60 relief. "A party may not invoke this rule where it could have pursued the issue on appeal. See *Smith Companies of Greenville v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct.App.1993) (finding relief from judgment is not a substitute for appeal from final judgment, particularly when it is clear party seeking relief could have litigated at trial and on appeal claims he now makes by motion)." *Tench v. Dept. of Education*, 347 S.C. 117, 553 S.E.2d at 453 (2001). Here, plaintiff acknowledges that its counsel of record at the time received the order of dismissal. At that time, plaintiff had the option of moving to alter or amend the October 1, 2015 order or then appealing it. It failed to do either. Rule 60 is not available to it to amend the order.

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Even if Rule 60 were available to it, I would deny the motion. "In determining whether to grant a motion under Rule 60(b), the trial judge 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." *Micronics v. S.C. Dept. of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). While in *Micronics* the plaintiff made an error in a hearing date and immediately sought relief, the Plaintiff here waited almost a year to bring the motion. *Id.* at 226. Plaintiff acknowledged both of its lawyers of record received the order of dismissal. As in *Micronics*, the moment of receipt would have been the most prompt time to seek relief as any order dismissing an action should be taken seriously, especially one adjudicating the case. Six months later, it filed a second action based on the same set of facts. Plaintiff still failed to act when

a motion to dismiss was brought in that case and even after it was heard by Judge Mullen in August of 2016. When a motion for relief from judgment under Rule 60(b) is brought within a year, whether it has been brought in a reasonable amount of time is within the discretion of the trial court. *Coleman v. Dunlap*, 306 S.C. 491, 413 S.E.2d 15 (1992). In my view, a year delay in this situation is too long, especially in light of similar cases of similar situations.

Further, the plaintiff has not given a valid reason for delay. It was represented, but not shown by affidavit or other evidence, that one of plaintiff's counsel of record had decided to cease doing business in South Carolina, insinuating that it had been abandoned.³ Generally, an attorney's negligence is imputed to the client for purposes of Rule 60 relief. *Sterns Bank, NA v. Glenwood Falls, LP*, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007).

Second, without further factual support, it is possible that the plaintiff, a sophisticated lender, was informed of the order and elected to do nothing at the time. Third, there was no information or representation provided to the Court that the plaintiff itself was ignorant of the dismissal.

Plaintiff relied on three cases to support its position that the order should be amended to state that the dismissal was without prejudice. In all three cases, however, the effected party moved immediately to protect its rights. *Small v. Muigo*, 254 S.C. 438, 175 S.E.2d 802 (1970) (“... plaintiff moved during the term of court, to vacate the order of dismissal upon the ground that his failure to appear for trial was not due to unreasonable neglect by him or his counsel...”); *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)(motion made 13 days after hearing missed

³ Notably, “abandonment by counsel” was not a stated ground for the motion in the plaintiff's filing and, accordingly, that issue is not properly before me. Instead, it alleged the defendants were undergoing foreclosure intervention efforts. However, plaintiff filed a Certificate of Compliance in August of 2012 prior to the Rule to Show Cause having been issued.


by former lawyer); *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006)(plaintiff filed a motion within 10 days of the order dismissing the case pursuant to Rule 59). In *Small* and *McComas*, the actions were dismissed when they were called for trial and the defendant could not appear at the moment it was called. In *Graham*, the supreme court granted Rule 60 relief where the lawyer for the Town of Loris quit the day before a hearing without prior notice. *Id.* at 452, 599. This Court notified the plaintiff in April of 2015 it needed to bring the case to a conclusion, then in September of 2015 issued a Rule to Show Cause to the plaintiff why the case should not be dismissed, hence it knew for six months of the need for action. The case was dismissed and the order mailed to two separate lawyers in two separate offices and the plaintiff did nothing. No record has been provided as to the timing of the Atlanta based lawyer's claimed withdrawal and the South Carolina counsel remained active in South Carolina.

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Even if one of the plaintiff's lawyers had ceased representation, the plaintiff was still obligated to monitor its case, given the amount of notice it had and the length of time the case had been proceeding. "[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." *Goodson v. American Bankers Ins. Co. of Florida*, 295 S.C. 400, 368 S.E.2d 687 (Ct. App. 1988). The action proceeded for three years with little to no action by the plaintiff and the current situation is a result of its own inaction.

For these reasons, the plaintiff's motion is DENIED.

AND IT IS SO ORDERED!


Perry M. Buckner, III
Presiding Judge

This 8th day of December, 2016
Walterboro, South Carolina