

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
)
 Rallis Holdings, LLC and Oriole)
 Properties, LLC,)
)
 Third-Party Petitioners,)
)
 IN RE:)
)
 Clear Skies Restoration, LLC,)
)
 Plaintiff,)
)
 vs.)
)
 Ivan Martinez and Paula A. Martinez,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2018-CP-23-03124

RECEIVED
 OCT 28 2019
 SC Court of Appeals
 ORDER

This matter comes before the court pursuant to separate motions filed by the individual Defendants Ivan Martinez and Paula A. Martinez. Defendant Ivan Martinez filed a motion to stay the execution of a writ of ejectment issued by this court pursuant to Rule 62(b) of the South Carolina Rules of Civil Procedure (“SCRCP”) and also motions to set aside the foreclosure judgment ordered by this court and subsequent foreclosure sale pursuant to Rule 60(b) SCRCP and for a new trial pursuant to Rule 59 SCRCP. Defendant Paula A. Martinez also filed a motion pursuant to Rule 62(b) to stay the execution of the same writ of ejectment and also motions to set aside the foreclosure judgment ordered by this court and subsequent foreclosure sale pursuant to Rule 60(b) SCRCP and for a new trial pursuant to Rule 59 SCRCP.

After an initial hearing was held on July 17, 2019, a subsequent hearing was held on August 1, 2019. Counsel for the individual Defendants Ivan Martinez and Paula A. Martinez,

Michael B. Dodd appeared at the hearing. Also appearing were M. Stokely Holder on behalf of the Plaintiff Clear Skies Restoration, LLC; attorney Brooks Haselden on behalf of Third Party Petitioner Rallis Holdings, LLC; and attorney Clayton M. Custer on behalf of Third Party Petitioner Oriole Properties, LLC. The Court has also held a post-hearing conference call with the above attorneys. Having considered the written motions, affidavits and other evidence presented by the parties, argument by counsel for all of the parties, and the applicable procedural, statutory, and case law, IT IS HEREBY ORDERED AS FOLLOWS:

FINDINGS OF FACTS

1. A Lis Pendens was filed on June 1, 2018 in the Office of the Greenville County Clerk of Court, naming Ivan Martinez as a party to the action. The Summons and Complaint were also filed on June 1, 2018 seeking Foreclosure of Mechanic’s Lien, said Mechanic’s Lien being filed on April 9, 2018, in the Office of the Register of Deeds for Greenville County in Book MI 0136 at Pages 1194, and describing the property being foreclosed. The property subject to this action is located at 2 Landstone Court, Greer, South Carolina 29650 (hereinafter “Property”). At the time this action was commenced, the Property was owned by Defendant Ivan Martinez and Defendant Paula A. Martinez, each with a one-half undivided interest in the Property.

2. An Amended Lis Pendens was filed on September 26, 2018, in the Office of the Greenville County Clerk of Court, naming as defendants Ivan Martinez and Paula A. Martinez. An Amended Mechanic’s Lien was also filed on September 26, 2018, in the Office of the Register of Deeds for Greenville County in Book MI 0141 at Pages 0573-0576, and describing the property being foreclosed; and an Amended Summons and Complaint was also filed on September 26, 2018.

3. Defendant Ivan Martinez resides at the Property subject to this action and has resided there since approximately 2007, as reflected in the record from the Affidavits filed with the court.

4. Two copies of the Amended Mechanic's Lien, Amended Lis Pendens, and the Amended Summons and Complaint were served upon the Defendant Ivan Martinez as shown by the Affidavits of Service filed with the court.¹ Service of these documents upon Paula Martinez was made by leaving an extra copy of the aforementioned documents with her ex – husband Ivan Martinez at the Property and not by service on her personally.

5. According to divorce court records in Greenville County, Defendant Ivan Martinez initiated a *pro se* divorce proceeding in 2015, which resulted in a final Divorce Decree on January 29, 2016. According to that Divorce Decree (2015 – DR – 23 – 2124), the parties separated on January 4, 2014, and Defendant Paula A. Martinez was remarried in June of 2016 and has since that time lived with her new husband. Her primary residence after 2016 was 4001 Pelham Road, Apt. 252, Greer, South Carolina, based on her Affidavit submitted to the Court and a copy of her South Carolina Driver's License which was submitted by counsel at the hearing.

6.. Neither Ivan Martinez nor Paula A. Martinez responded to the Summons and Complaint. Both were held to be in default by this court as shown by the Order for Entry of Default dated December 31, 2018.

7. An Order of Reference to the Master in Equity was had and the case was set for a final hearing before the court. A hearing was held on February 7, 2019 at which the Plaintiff's attorney appeared. Neither Defendant Ivan Martinez nor Defendant Paula A. Martinez appeared.

¹ Third Party Petitioners requested permission to submit additional post-hearing affidavits regarding service and notice of Defendant Ivan Martinez, which request was denied by the court.

8. The court issued an Order for Judgment And Decree of Foreclosure on May 8, 2019. The Order provided that the Property should be sold at public auction after due advertisement to satisfy the debt owed to the Plaintiff in the amount of \$12, 020.48. . The Order For Judgment And Decree of Foreclosure stated that:

The Master-in-Equity will apply the proceeds of the sale as follows:

FIRST: To the payment of the Mortgage liens;

NEXT: To the payment of the amount of the costs and expenses of this action, including any Guardian ad Litem fee or fees of attorneys appointed under Order of Court;

NEXT: To the payment to the Plaintiff or Plaintiff's attorney, of the amount of Plaintiff's debt and interest, or so much thereof as the purchase money will pay on the same;

NEXT: Any surplus shall be held pending further Order of this Court.

(See, Order for Judgment and Decree of Foreclosure p. 4-5)

9. The Property was duly advertised for sale and sold at the regular monthly auction in Greenville County on June 3, 2019. Third Party Petitioner Rallis Holdings, LLC ("Rallis") entered the high bid of \$120,100 and paid a 5% deposit at that time. Rallis later assigned one-half of its interest in the property to Oriole Properties, LLC ("Oriole"). Both companies thereafter complied with the bid and paid the balance to the Court, and a Master's Deed was issued to those purchasers. Said deed was thereafter filed June 11, 2019 in Deed Book 2568, at page 290 with the Greenville County Register of Deeds Office.

10. On June 12, 2019 an Order for Writ of Ejectment of defendants Ivan Martinez and Paula Martinez "or any other occupant" of the Property was entered by the court.

11. On July 2, 2019 Defendant Ivan Martinez was served with the order for writ of ejectment.

12. Defendant Paula Martinez received actual knowledge of the foreclosure proceedings and sale of the Property in the middle of June 2019 through a conversation with her ex-husband. Neither Defendant Ivan Martinez nor Defendant Paula A. Martinez received written notice of the Order For Judgment And Decree of Foreclosure in this case.

13. That subsequent to the hearing held August 1, 2019, Plaintiff filed a Rule 60, SCRCP, Motion to Correct on August 21, 2019 seeking that the Order filed May 8, 2019 be amended to delete the requirement that any sales proceeds be paid to the mortgage holders prior to disbursement of any funds to Plaintiff. The Motion sought that the language reflect that the property should be sold subject to said first and second mortgages. Counsel for the 3rd party purchasers objected to said Motion maintaining that it was improper to seek a change in the terms after the actual sale of the real property. In light of this objection, Plaintiff advised the court it was asking that the entire sale be set aside.

LEGAL ANALYSIS/DISCUSSION

Rule 62(b) SCRCP provides that, "In its discretion...the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial ... made pursuant to Rule 59, or a motion for relief from a judgment or order made pursuant to Rule 60..." Both Defendant Paula Martinez and Defendant Ivan Martinez made motions under Rule 59 SCRCP and Rule 60 SCRCP. The court in its discretion finds that the facts support a ruling in favor of granting the motion to stay the order for writ of ejectment pending the outcome of these proceedings.

Rule 59 SCRCP states in part that, "A new trial may be granted to all or any of the parties

and on all or part of the issues...in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State.” Rule 59(b) provides that “In non-jury actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment...” According to the record, neither defendant in this case received written notice of the order for judgment. The “decision to grant a new trial is left to the sound discretion of the trial court...” *McAlhaney v. McElveen*, 413 S.C. 299, 303, 775 S.E.2d 411, 413 (Ct. App.2015). In the instant case both Defendant Ivan Martinez and Defendant Paula A. Martinez have timely filed motions under Rule 59. .

Rule 60(b) SCRPC provides that, “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...The motion shall be made within a reasonable time...and not more than one year after the judgment order or proceeding was entered or taken.” The court finds that both Defendant Ivan Martinez and Defendant Paula A. Martinez have made timely motions under the rule. “Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. *Tobias v. Rice*, 379 S.C. 357, 665 S.E.2d 216, 219 (Ct. App. 2008).

A. DISCUSSION AS TO DEFENDANT IVAN MARTINEZ

In his motions under Rule 59 SCRPC and Rule 60(b) SCRPC, Defendant Ivan Martinez asserts that he was not properly served with any papers, pleadings, or other court filings during the course of this action. He claims that because he was not properly served he was not afforded proper due process and that as a result he should be granted a new trial pursuant to Rule 59 SCRPC and that the judgment of foreclosure should and the subsequent foreclosure sale should be set aside and vacated. He further argues that the judgment in this case should be declared void under Rule 60(b)(4). Defendant Ivan Martinez was held in default by the court during the

proceedings and an Order for Entry of Default signed and filed by the court on December 31, 2018.

Affidavits filed and on record with the court in this case document that Defendant Ivan Martinez was personally served with the original Summons and Complaint (along with Exhibits) at the Property on July 1, 2018. An Affidavit of Service on file with the court also shows that Defendant Ivan Martinez was later served on October 22, 2019, and again at the Property, with a copy of the Amended Mechanic's Lien, Amended Lis Pendens, and Amended Summons and Complaint. The court record also reflects that he was given adequate notice of hearings and proceedings because plaintiff's counsel served copies of those documents on him at the Property as evidenced by Certificates of Service in the court file. While the court finds that Defendant Ivan Martinez made proper and timely motions under Rules 59 and 60 SCRCP, the court in its discretion, finds that the record supports proper service was made as to Defendant Ivan Martinez, that he had an opportunity to defend the claims made against him, and that proper notice related to the sale of the Property was given. The court hereby DENIES Defendant Ivan Martinez's motion for a new trial and for relief pursuant to Rules 59 and 60 SCRCP.

B. DISCUSSION AS TO DEFENDANT PAUL A. MARTINEZ

Defendant Paula Martinez in her motions under Rule 59 SCRCP and Rule 60(b) SCRCP requests that the court grant her a new trial and also set aside and vacate the Order For Judgment and Decree of Foreclosure in this case. The record clearly indicates that the Plaintiff attempted to serve Paula Martinez by having a process server leave the Amended Mechanic's Lien, Amended Lis Pendens, and Amended Summons and Complaint with Defendant Ivan Martinez at the Property subject to this action. The Court finds that Paula and Ivan Martinez are were not married at that time and that Defendant Paula A. Martinez has not lived at the Property since at

least 2014. Further, the Court finds that Defendant Paula A. Martinez is now remarried.

Defendant Paula A. Martinez appeals to the recognized “historical power of a court of equity to modify its decree in light of subsequent conditions.” *Mr. G v. Mrs. G*, 320 S.C. 305,311,465 S.E.2d 101, 107 (Ct. App. 1995). Rule 60(b)(4), SCRPC provides: “On motion and upon such terms as are just, the court may relieve a party ... from final judgment, order or proceeding [because] ... the judgment is void.” A judgment is void if a court acts without personal jurisdiction. A court generally obtains personal jurisdiction by the service of a summons. *BB&T v. Taylor*, 369 S.C. 548, 554-55, 633 S.E.2d 501, 504-05 (2006). Defendant Paula A. Martinez argues that personal jurisdiction was never had as to her in this case because she was never served with any papers related to the case prior to the judgment and sale.

Rule 4(d)(1) SCRPC states that, “personal service may be made upon an individual by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein...” Upon review of the evidence, Defendant Paula A. Martinez did not live at the Property subject to this action. South Carolina courts have recognized that “one’s dwelling place or abode is determined by the particularized facts of each case... [and that] a temporary residence is not a person’s dwelling place or usual place of abode if a more permanent residence is shown to exist.” *Fassett v. Evans*, 364 S.C. 42, 47-48, 610 S.E.2d 841, 844 (Ct. App. 2005). Defendant Paula A. Martinez did not use the Property as a temporary place of residence as she has not had any direct communication or contact with Defendant Ivan Martinez since 2016. . She established a permanent residence elsewhere by no later than 2016. . Therefore, the court finds that Defendant Paula A. Martinez was not served and the court therefore lacked personal jurisdiction over Defendant Paula A. Martinez. The court finds that the judgment and sale as to

Defendant Paula A. Martinez and her one – half interest in the Property are void for lack of personal jurisdiction.

C. VACATING FORECLOSURE SALE

The Third Party Petitioners Rallis Holdings, LLC and Oriole Properties, LLC (“Third Party Petitioners”) argue that service was in fact proper on Defendant Paula Martinez, and that even if it was not proper, their status as bona fide purchasers prevails over any subsequent determination as to improper service on Defendant Paula A. Martinez. South Carolina Code Section 15-39-870 provides as follows: “Upon the execution and delivery by the proper officer of the court of a deed for any property sold at judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for values without notice, notwithstanding such sale may not subsequently be confirmed by the court.” The Defendant Paula A. Martinez argues that the statute is not satisfied because the court in this case was not a “court of competent jurisdiction” in that personal jurisdiction over Defendant Paula A. Martinez was never established and therefore any judgment against her should be declared void.

The Supreme Court of South Carolina articulated that South Carolina Code Section 15-39-870 “...exists because sound public policy requires that the validity of judicial sales be upheld, if in reason and justice it can be done.” *Belle Hall Plantation Homeowner’s Association, Inc. v. John A. Murray*, 419 S.C. 605, 799 S.E.2d 310 (Ct. App.2017) quoting *Cumbie v. Newberry*, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968). The question in this case is, in reason and justice can this sale be upheld?

To qualify as a bona fide purchaser, a party must show “(1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it,

and (3) a bona fide purchase, ‘i.e., in good faith and with integrity of dealing, without notice of a lien or defect.’” *Robinson v. Estate of Harris*, 378 S.C. 140, 146, 662 S.E.2d 420, 423 (Ct. App. 2008) (quoting *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874–75 (2006)). The Third Party Petitioners argue they are bona fide purchasers for value (“BFP”).² The record indicates the Third Party Petitioners paid \$120,100.00 in exchange for the property and were also issued a deed that has been recorded. The third element requires a BFP to have made a bona fide purchase. “The bona fide purchaser must show all three conditions – actual payment, acquiring of legal title, and bona fide purchase...” *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006).

As stated above, the court finds that Defendant Paula A. Martinez was never served with any papers or pleadings related to this civil action; therefore, personal jurisdiction was never established as to her because she had no notice of an action against her: “Generally, a person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it against [her] person or property.” *Belle Hall Plantation Homeowner’s Ass’n, Inc. v. Murray*, 419 S.C. 605, 617-18, 799 S.E.2d 310, 316 (Ct. App. 2017).

In this case, the court that held the sale and issued the judgment and new deed was not a “court of competent jurisdiction” because personal jurisdiction never attached as to Defendant Paula A. Martinez. Accordingly, even if the Third Party Petitioners did not have notice of the defect in the foreclosure judgment, as they argue, their status as a BFP is outweighed by the fundamental right that every defendant enjoys to due process. . The court finds fundamental right to due process must be upheld with regard to service of process.

The Supreme Court of the United States has since 1877 recognized that the reason

² Third Party Petitioners engaged a well-known and reputable Greenville real estate law firm to perform a title search of the Property prior to obtaining the deed to the Property.

behind requiring proper service of process is so that the defendant in a lawsuit be given notice that he is answerable to the plaintiff. In order for justice to be had, personal jurisdiction must be established and this cannot be done without proper service being made on a defendant. The court has held that personal judgments are void without personal service. See, *Pennoyer v. Neff*, 95 U. S. 714. “The determination of whether to set aside a foreclosure sale is a matter within the discretion of the trial court.” *Bloody Point Property Owner’s Ass’n, v. Ashton*, 410 S.C. 62, 762 S.E.2d 729 (Ct. App. 2014). The court finds that because personal jurisdiction was never established over Defendant Paula A. Martinez, the court was not one of competent jurisdiction as contemplated under the statute and therefore any judgment issued or sale conducted was void as to her for lack of due process.

In light of the above, the Court finds and concludes that the sale shall be set aside as to Paula Martinez based upon the uncontroverted lack of her being aware of the legal proceedings against her.

As to Ivan Martinez, the Court declines to set the default aside based upon the above recitation of facts and conclusions of law. Notwithstanding this, and in light of Plaintiff’s Motion to Correct and the post-August 1, 2019 request that the Sale be set aside, the Court sets aside the foreclosure sale based upon the unusually convoluted facts and in an effort to place all parties in the position of fully and fairly litigating all issues, including the amounts actually owed Plaintiff, if any, and the terms of any necessary judicial sale. Ivan Martinez shall remain in default and shall be allowed to litigate only the amount of damages. Paula Martinez shall be allowed to litigate liability and damage amounts. Plaintiff shall, within 45 days, pay back to the Court all sales proceeds previously paid to it. Further, all sales proceeds shall be paid to the 3rd party purchasers upon receipt of said funds, as well as the surplus funds, being paid to the Court. And,

the foreclosure deed filed June 11, 2019 in the Greenville ROD Office in deed book 2568 at page 290 is declared void and shall be so noted by the Greenville ROD.

The issues to be litigated shall move to trial as soon as possible.

CONCLUSIONS

Based upon review of the written motions, affidavits and other evidence presented by the parties, argument by counsel for all of the parties, and the applicable procedural, statutory, and case law and the legal analysis and discussion above, the court hereby orders the following:

1. The motion to stay the Order for Writ of Ejectment by the Defendants Ivan Martinez and Paula A. Martinez is hereby GRANTED ;

2. The motion for new trial and for relief pursuant to Rules 59 and 60(b) made by Defendant Ivan Martinez, as to his one-half interest in the Property, is hereby DENIED; and,

3. The motion pursuant to Rule 59 for a new trial and the motion under Rule 60(b) to set aside and vacate the foreclosure judgment ordered by this court and subsequent foreclosure sale by the Defendant Paula A. Martinez, as to her one-half interest in the Property, is hereby GRANTED.

4. The foreclosure deed filed in the Greenville ROD Office in deed book 2568 at page 290 is declared void, with the same to be noted by the ROD.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE FOLLOWS

August _____, 2019
Greenville, South Carolina



Greenville Common Pleas

Case Caption: Clear Skies Restoration LLC vs. Ivan Martinez

Case Number: 2018CP2303124

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)