

STATE OF SOUTH CAROLINA
COUNTY OF MARION

IN THE COURT OF COMMON PLEAS
CASE NO.: 2018-CP-33-00653

Wilmington Savings Fund Society, FSB,
as trustee of Stanwich Mortgage Loan
Trust A,
Plaintiff,
vs.

ORDER DENYING THIRD PARTY MOTION
TO INTERVENE AND MOTION TO SET
ASIDE JUDGMENT

Bertha Dunham a/k/a Bertha E. Dunham;
and Ernest L. Dunham,
Defendant(s).

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SC Court of Appeals

INTRODUCTION

THIS MATTER came before me on October 29, 2019 to fully hear and adjudicate the Motion to Intervene and Motion to Set Aside Judgment filed by Beulah Mae Belin and James Belin, by and through their attorney, Paul B. Ferrara, III, (hereinafter "Belins"), who live in a mobile/manufactured home on the land of Bertha Dunham and Ernest Dunham (hereinafter "Defendants"). Present at the hearing was William P. Stork, Esq., attorney for Plaintiff, and appearing telephonically was Paul B. Ferrara, III, attorney for the Belins.

Based upon the arguments, testimony, and evidence presented at trial, I find and conclude as follows:

BACKGROUND

The instant action is one for foreclosure of property located in Marion County, South Carolina. The foreclosure arises out of a Mortgage Note ("Note") executed by Defendants on April 13, 2006 and delivered to CitiFinancial, Inc. a certain Promissory Note ("Note") in writing wherein and whereby the Defendants promised to pay to the Plaintiff, the principal sum of \$37,970.54, together with interest at an adjustable interest rate with an initial interest rate of 10.63% per annum on the unpaid balance; said principal and interest being payable in monthly installments, commencing on the 1st day of each month thereafter until the said Note is fully paid.

In order to secure the payment of said Note, the said Defendant, did on the same date, to wit, April 13, 2006, make, execute, and deliver to CitiFinancial, Inc., its successors and assigns, a certain real estate Mortgage ("Mortgage") covering real property located in Marion County, South Carolina as more fully described in said Mortgage as follows:

ALL that certain piece, parcel of lot of land in Brittons Neck Township, Marion County, South Carolina, containing One-Half (1 / 2) acre, bounded Northeast One Hundred Five (105) feet by U.S. Highway No. 378; Southeast Two Hundred Ten (210) feet by road leading into Dog Lake; Southwest One Hundred Five (105) feet by lands of E.J. Atkinson; and Northwest Two Hundred Ten (210) feet by lands of E.J. Atkinson. The said lot being shown on a Map of Lot sold by E.J. Atkinson to Southeastern Homes, made by Johnson Engineers July 16, 1969.

Together with all singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

This being the same property conveyed to William Dunham, Jr. and Bertha E. Dunham by deed of the United States of America, dated October 15, 1975 and recorded November 5, 1975 in Deed Book A136 at Page 583; thereafter, William Dunham, Jr. conveyed his interest in the subject property to Bertha E. Dunham by deed dated May 10, 1983 and recorded September 19, 1983 in Deed Book A19 at Page 24.

Handwritten initials: WJ, HP
TMS No. 163-00-00-053-000

Property Address: 1701 West Highway 378, Gresham, SC 29546

The Mortgage was recorded April 13, 2006 in the ROD's Office for Marion County in Book 819 at page 146.

Thereafter, the Mortgage was assigned to Citifinancial Servicing, LLC by assignment recorded on December 21, 2017 in Book 401 at Page 5. Thereafter, the Mortgage was assigned to Plaintiff by assignment recorded on December 21, 2017 in Book 401 at Page 6. The Mortgage evidences and secures the repayment of money advanced by

the Mortgagee to, or on behalf of, the mortgagor(s) and constitutes a purchase money first lien on the Mortgaged premises.

On September 20, 2018, the Plaintiff filed its Lis Pendens, Summons, and Complaint for Foreclosure. By Order filed March 12, 2019, this matter was referred to the Honorable Haigh Porter as Special Referee for Marion County to hear any issues, including motions after sale or judgment. On April 25, 2019, a Special Referee's Order of Judgment of Foreclosure and Sale Decree was filed along with a Notice of Sale directing the subject real property to be sold at public auction on June 11, 2019. The Notice of Sale of the subject real property was advertised in the Star Enterprise, a local newspaper of general circulation, on May 22, 2019, May 29, 2019, and June 5, 2019. On June 11, 2019, the subject real property was sold at public auction with Plaintiff being the high bidder. After compliance with their bid, Plaintiff was issued a deed to the subject real property which was recorded with the Marion County ROD's office on August 28, 2019 in Book 466 at Page 309.

On October 25, 2019, over a year after Plaintiff filed their Lis Pendens and over 4 months since the subject property sold at public auction, the Belins filed a Motion to Intervene and Motion to Set Aside Judgment.

DISCUSSION

STANDARD FOR INTERVENTION

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South Carolina courts should not always grant intervention. *Ken's Cabana, LLC v. Flemington Props., LLC (ex parte Horry Cnty. State Bank)*, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004). Though intervention "should be liberally granted," courts should consider judicial efficiency and the practical consequences of decisions to allow or deny intervention. *Id.* Essentially, courts should consider the "unique facts and circumstances" of each case. *Id.*

An applicant is entitled to intervention of right if she timely applies and either "a statute confers an unconditional right to intervene," Rule 24(a)(1), SCRPC, or

the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair

or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a)(2), SCRPC. Here, no statute grants the Belins an unconditional right to intervene. Accordingly, the Belins asserts a right to intervene based on Rule 24(a)(2) of the South Carolina Rules of Civil Procedure.

"Intervention of right requires a direct, substantial, legally protectable interest in the proceedings." *Dep't of Health & Env'tl. Control v. Columbia Organic Chemistry Co. (ex parte Reichlyn)*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993). An application for intervention of right must

(1) Establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented.

Id. At 498, S.E.2d at 663; *Berkeley Electric Coop., Inc. v. Mount Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). All four factors are required to intervene on this basis; failing to establish any one prevents an applicant from intervening. *Dep't of Health & Env'tl. Control v. Columbia Organic Chemistry Co. (ex parte Reichlyn)*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993).

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An applicant can ask a court to allow permissive intervention if the applicant timely applies and either "a statute confers a conditional right to intervene," Rule 24(b)(1), SCRPC, or "an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24 (b)(2), SCRPC. "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24, SCRPC. While it is unclear from the body of the Belins' Motion, they may assert that either S.C. Code Ann. §15-67-210 or §15-67-240 provide the Belins a conditional right to intervene. If this is not their assertion, then the Belins assert a right to intervene based on Rule 24(b)(2) of the South Carolina Rules of Civil procedure.

South Carolina courts have the discretion to grant or deny permissive intervention. *S.C. Tax Comm'n v. Union Cnty. Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988). However, courts should only grant permissive intervention when an applicant "has a

cause of action or defense it could bring or assert." *Id.* At 263, 368 S.E.2d at 75-76. Permissive intervention exists because administrative procedures support disposing of claims or defenses together when they have common questions. *Id.* At 263, 368 S.E.2d at 75. Without permissive intervention, an applicant could be forced to "institute or ... defend a separate proceeding that would substantially duplicate the one in question." *Id.* At 263, 368 S.E.2d at 75-76.

A. THE BELINS ARE NOT ENTITLED TO INTERVENE IN THE LITIGATION

1. The Belins are Not Entitled To Intervention Of Right.

The Belins are not entitled to intervention of right. Because the Belins have no interest in the subject real property, because the Belins failed to timely apply for intervention, and because the Belins interest was already adequately protected through the foreclosure proceeding, the Belins' Motion to Intervene fails.

A. The Belins are not entitled to intervention of right because they have no interest in the subject real property.

The Belins do not have any interest in the subject real property, and therefore they are not entitled to intervention of right. One of the elements which must be satisfied for a Court to grant intervention of right is that the Intervenor must, "assert an interest relating to the property or transaction which is the subject of the action." *Horry Cnty. State Bank v. Flemington Props., LLC*, 631 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004). The Belins have no such interest. "Failure to satisfy *any one* of the four requirements precludes intervention." *Dep't of Health & Envtl. Control v. Columbia Organic Chemistry Co. (ex parte Reichlyn)*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993)(*emphasis added*).

i. The Belins have no title to the subject property.

In their Motion to Intervention, the Belins merely assert a possible civil claim for adverse possession, they do not claim that any portion of the real property was ever deeded to them. Prior to the initiation of foreclosure proceedings, a title search was conducted to determine which parties may have an interest in the subject real property. No additional parties were found to have any interest in the subject real property. A review of the public

records shows that no deed vesting any legal interest to the subject real property to the Belins is recorded with the Marion County Register of Deeds. Generally, for a deed to be a valid conveyance, it is required to be recorded with the office of the register of deeds. S.C. Code Ann. §30-7-10 (2017). "No possession of real property described in an instrument of writing required by law to be recorded shall operate as notice of such instrument." S.C. Code Ann. §30-7-90 (2017).

The Belins argued that the placement of a mobile home on the subject real property may provide an interest in the real property upon which the mobile home is situated. This assertion is wrong and contrary to law governing the ownership of mobile homes. Under S.C. Code Ann. 56-19-10(39) (1976), a mobile home is not considered real property, but is considered personal property which must be titled with the Department of Motor Vehicles and is taxed just like any other personal property which is taxed by the Department of Motor Vehicles. The argument that the placement of a mobile home on property leads to adverse possession is essentially the same argument as if to say that the parking of a moped on a piece of property leads to a claim of adverse possession.

ii. *The Belins merely assert a possible civil cause of action for adverse possession.*

Adverse possession is not an interest in real property, it is merely a civil cause of action. Black's Law Dictionary 6th Ed. (1990). After a civil action asserting adverse possession is filed, a trier of fact must determine whether there is enough evidence to substantiate a claim of adverse possession, and only then would title be transferred to the alleged adverse possessor. *see Miller v. Leaird*, 307 S.C. 56, 413 S.E.2d 841 (1992). Even if the assertion of adverse possession were to create an interest, no action has been filed by the Belins at this time. A review of the public index finds no Lis Pendens filed by the Belins much less a suit for adverse possession. In this matter, the Belins claim for adverse possession must be construed in the same light as a claim for premises liability would. Both adverse possession and premises liability are civil causes of action which must be asserted against the landowner, and neither creates an interest in the real property.

Because the Belins have no legal title to the subject real property, and because adverse possession is a civil cause of action which, when merely referenced in a pleading, does not create an interest in the subject property, the Belins have no interest in the subject real property.

B. The Belins are not entitled to intervention of right because they did not apply in a timely fashion.

The Belins did not timely apply for intervention of right. The following factors determine whether a motion to intervene is timely:

- 1) The time that has passed since the applicant knew or should have known of his or her interest in the suit; 2) the reason for the delay; 3) the stage to which the litigation has progressed; and 4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denying intervention.

Dep't of Health & Envtl. Control v. Columbia Organic Chemistry Co. (ex parte Reichlyn), 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993).

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The Belins filed their Motion to Intervene on October 25, 2019. This filing was over a year after Plaintiff filed their Lis Pendens in this matter. "From the time of filing only, the pendency of the action shall be constructive notice to a purchaser or encumbrancer of the property affected thereby ..." S.C. Code Ann. §15-11-20 (1976). As of September 20, 2018, the Belins were on constructive notice of the Plaintiff's action because of the filing of Plaintiff's Lis Pendens. The clock to intervene started ticking the moment that Plaintiff filed their Lis Pendens. In addition to the notice proffered by the Lis Pendens, the subject real property was sold at public auction. This auction was advertised for three consecutive weeks in a local paper of general circulation. The publication provided additional notice to the Belins of the pending action. In spite of the notice provided by the Lis Pendens, and in spite of the notice provided by the publication for three consecutive weeks of the public auction, the Belins took no action to intervene in the subject action.

No reason has been delineated by the Belins which would justify this delay.

Litigation of this matter has progressed to the point that the case is finalized and the subject property has been sold at public auction. This is the penultimate point of the matter and would be extremely prejudicial to Plaintiff to allow for intervention. Assuming,

arguendo, that intervention were allowed, Plaintiff has incurred a plethora of costs, expenses, and loss of revenue which would be ongoing. A denial of intervention, in the alternative, does not prejudice the Belins. According to their own Motion, their mobile home was not placed on the subject real property until June of 2006. Plaintiff's Mortgage was recorded with the Marion County Register of Deeds on April 13, 2006, so even if the Belins were allowed to intervene, and even if they were to succeed on their cause of action for adverse possession, any and all interest gained would be "subject to" Plaintiff's mortgage and would be wiped out through the subsequent foreclosure sale.

In summation, the Belins' Motion to Intervene is untimely, there is no justification proffered for the delay, litigation has progressed to the point where all issues have been fully adjudicated and the real property sold, and the Plaintiff would be extremely prejudiced by intervention while the Belins are not prejudiced by the denial of intervention.

C. The Belins are not entitled to intervention of right because this action does not impair or impede their ability to protect their interest.

As was discussed above, Plaintiff's Mortgage was executed by the Dunhams on April 13, 2006 and was filed of record with the Marion County Register of Deeds on April 13, 2006 in Book 819 at Page 146. According to the Belins own motion, the mobile home was not placed on the subject real property until June of 2006. *Mtn. to Intervene* at 2. As South Carolina is a race-notice state whereby any interest or lien created after the recording of a prior interest or lien is junior and "subject to" that certain senior lien. *see* S.C. Code Ann. 30-7-10 & 30-7-20 (1976).

In the present action, because Plaintiff's Mortgage encumbering the subject real property was recorded on April 13, 2006, and because the Belins allege that their mobile home was not placed on the subject real property until June of 2006, and possible interest that the Belins would be vested through a successful adverse possession claim would be "subject to" Plaintiff's mortgage and, therefore, would be subsequently eliminated through Plaintiff's foreclosure.

In summation, even if the Belins were to eventually bring an adverse possession cause of action, and even if the Belins were successful with their cause of action, because

the Belins' interest would be "subject to" Plaintiff's Mortgage we would wind up in the exact same position we are now, only with much more time and money wasted from all parties.

D. The Belins are not entitled to intervention of right because any interest they may have if they are successful in an adverse possession cause of action would be adequately represented by existing parties.

Any interest that the Belins may have gained if they were to have brought and were successful in an adverse possession cause of action prior to the initiation of Plaintiff's foreclosure would have been adequately represent by the existing Defendants to the foreclosure action. Whether existing representation is adequate to protect the interests of an applicant depends on:

- 1) Whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

Berkeley Electric Coop., Inc. v. Mount Pleasant, 302 S.C 186, 191, 394 S.E.2d 712, 715 (1990). Courts presume that an applicant's interests are adequately represented "[w]hen an applicant for intervention and an existing party have the same interests or ultimate objective." *S.C. Tax Comm'n v. Union Cnty. Treasurer*, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)(denying intervention because applicant's only objective was to retain disputed tax funds, which was identical to the objective of the County Treasurer); *see also Ken's Cabana LLC v. Flemington Props., LLC (ex parte Horry Cnty. State Bank)*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004). In deciding adequacy of representation, courts consider "whether the absentee is likely to have anything of his own to say that will be of value." *Ken's Cabana, LLC v. Flemington Props., LLC (ex parte Horry Cnty. State Bank)* 361 S.C. 503, 510, 604 S.E.2d 723, 726 (Ct. App. 2004). The applicant has the burden to show that existing representation is inadequate. *Id.*

In the present case, the Belins did not meet their burden to show inadequate representation. Since the Belins are not parties to the Note and Mortgage at issue, they

cannot assert any unique arguments which would not have been raised by the Defendants. Indeed, the Belins would have had the exact same goal as the Defendants; attempting to delay or stop Plaintiff's foreclosure and eviction proceedings.

In a case similar to this one, the South Carolina Court of Appeals denied the intervention of a mortgagee in regards to a dispute of a mortgagor's possession or and title to real property. *see Ken's Cabana, LLC v. Flemington Props., LLC (ex parte Horry Cnty. State Bank)*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004). In *Ken's Cabana*, a married couple sold restaurant property to Ken's Cabana. *Id.* At 505, 604 S.E.2d at 724. As part of the purchase, the married couple's company granted Ken's Cabana a nonexclusive parking easement. *Id.* Ken's Cabana borrowed money from Horry County State Bank to make the purchase; the loan was secured by a mortgage on the restaurant and the easement. *Id.* At 506, 604 S.E.2d at 724. Later, another company bought the property on which the easement was located. *Id.* When Ken's Cabana violated the terms of the easement, the new owner terminated it. *Id.* Ken's Cabana sued the new owner, and Horry County State Bank tried to intervene. *Id.* At 506-507, 604 S.E.2d at 724-25.

The South Carolina Court of Appeals upheld the trial court's ruling that Horry County State Bank could not intervene because Ken's Cabana adequately represented Horry County State Bank's interests. *Id.* At 513, 604 S.E.2d at 728. The Court found that the interests of both parties were "essentially the same" – to retain the easement. Indeed, the Court found that,

"The Bank's mortgage on the parking easement is only as good as Ken's Cabana's right to use it. As the trial judge found, 'The rights and defenses of the Bank rise and fall with the acts and omissions of their mortgagor, Ken's Cabana.' They share the same interest and objective."

Id. At 510, 604 S.E.2d at 727. Horry County State bank could not identify any arguments or defenses that Ken's Cabana could not have raised. *Id.* Additionally, Horry County State Bank could not enumerate any "unique knowledge, experience, or perspective that [it] could bring to the proceedings." *Id.* As such, the South Carolina Court of Appeals upheld the lower court's denial of intervention of right.

In this matter, the Belins are like Horry County State Bank in *Ken's Cabana*. The Belins' interests are identical to that of the Defendants', delaying or defending against the foreclosure and eviction proceedings.

Indeed, the Belins argument for intervention of right is even weaker than that of Horry County State Bank's. Unlike Horry County State Bank, the Belins are not in privity of contract with any party to this case. The Belins now assert an interest based on a possible cause of action which would have begun to accrue after the filing of Plaintiff's Mortgage.

Plaintiff also asserts that the Belins' interests are adequately represented even in the Defendants and the Belins have different goals for the litigation. The mere possibility that two parties could have different intentions about the disposition of property is not enough to prove that representation is inadequate. *Ken's Cabana, LLC v. Flemington Props., LLC (ex parte Horry Cnty. State Bank)* 361 S.C. 503, 509, 604 S.E.2d 723, 726 (Ct. App. 2004). In *Ken's Cabana*, Horry County State Bank claimed that its intentions for the mortgage property might be different from Ken's Cabana. *Id.* Ken's Cabana might want to sell the restaurant or declare bankruptcy, which Horry County State Bank's intent was to protect its security interest. *Id.* The South Carolina Court of Appeals found that the possible difference in intentions did not show that Ken's Cabana was an inadequate representative of Horry County State Bank's interests. The same logic applies here.

Because the Belins interests in this matter are the mirror image of the Defendant's interests, and because the Belins cannot not identify any arguments or defenses which could not have been raised by the Defendants, and because the mere possibility that the Belins and the Defendants intentions about the disposition of the property is inadequate to show inadequate representation, the Belins are not entitled to intervention of right.

2. **The Belins are Not Entitled To Permissive Intervention.**

The Belins are not entitled to permissive intervention.

"To warrant intervention under Rule 24(b) an applicant should ordinarily show he is charged with a public duty requiring him to intervene, or he has a claim or defense involving a question of law or fact in common with the main action. A mere general interest in the subject matter of the litigation is not sufficient." *S.C. Tax Comm'n v. Union Cnty. Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988).

Since no statute conveys the Belins the right to intervene, there is no public duty requiring them to intervene. Because the Belins are not a party to the subject promissory note and mortgage, because the Belins have no interest in the subject real property, and because any possible claim for adverse possession would have begun to accrue after the filing of Plaintiff's Mortgage, there are no claims or defenses which she may assert in the present action. At this junction, the Belins have a mere general interest in the litigation, and as was stated in *S.C. Tax Comm'n v. Union Cnty. Treasurer*, a mere general interest in the litigation is not sufficient for intervention.

Furthermore, like intervention of right, permissive intervention requires that an applicant's interests be different than those of existing parties to the action. *S.C. Tax Comm'n v. Union Cnty. Treasurer*, 295 S.C. 257, 263-64, 368 S.E.2d 72, 75 (Ct. App. 1988). Here, as was discussed above, the Belins interests are the mirror image of the interests of the Defendants.

Because there is no statute which conveys the Belins the right to intervene, because the Belins are not a party to the subject promissory note and mortgage, because the Belins have no legal interest in the subject real property, and because any interest which would be gained through adverse possession (if the Belins ever bring the action and assuming they are successful in Court) would be "subject to" Plaintiff's mortgage, and because the Belins' interests in the litigation are the same as that of the Defendants, they are not entitled to permissive intervention.

B. THE BELINS ARE NOT ENTITLED TO HAVE THE JUDGMENT VACATED

While the Belins' Motion to set aside the Special Referee's order of Judgment of Foreclosure and Sale asserts to be a motion pursuant to Rule 55, SCRPC, the proper Rule under which to move to set aside a Judgment is Rule 60, SCRPC. A motion under Rule 55, SCRPC would be proper if the Belins were seeking to get relief from default, but as a Judgment has been entered, and that Judgment has been of record for quite some time, the proper motion would be under Rule 60, SCRPC. "Relief from a final judgment must be had through Rule 60 which is the mechanism for relief from a judgment or order." *Thompson v. Ballentine*, 298 S.c. 289, 291, 379 S.E.2d 896, 898 (1989). Since the proper motion for

relief from judgment is under Rule 60, SCRCP, it is that analysis that Plaintiff will discuss in this Order. As no clerical error is asserted by the Belins, this motion is pursuant to Rule 60(b), SCRCP.

“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) *reversed* 386 S.C. 306, 688 S.E.2d 552 (2010). “Rule 60(b), SCRCP requires a show in of one of five enumerated reasons before the court may grant relief from a judgment.” *Patterson v. McNeil & Associates, Inc.*, 312 S.C. 471, 441 S.E.2d 328, 329 n.2 (Ct.App 1994). “It is well settled that the moving party in a Rule 60(b) motion has the burden of presenting evidence entitling him to relief. Memorandum in support of a motion is not evidence.” *McClurg v. Deaton* 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011). “In determining whether one should be relieved from the entry of default, a court shall consider the following factors: (1) the timing of the motion for relief; (2) whether one has a meritorious defense; and (3) the degree of prejudice to the nonmoving party if the relief is granted.” *Top Value Homes, Inc. v. Harden*, 319 S.C. 302, 460 S.E.2d 427, 429 (Ct.App 1995). While the Belins’ Motion is made within the 1-year timeframe as delineated by Rule 60(b), SCRCP, there is no meritorious defense and the granting of the motion would be extremely prejudicial to the Plaintiff.

1. The Belins have no meritorious defense to the foreclosure action.

It is paramount that a moving party must show a meritorious defense to be entitled to relief under Rule 60(b), SCRCP. *see Bowers v. Bowers*, 304 S.C. 65, 66, 403 S.E.2d 127, 129 (Ct. App. 1991). “A motion to open or vacate judgment should be supported by affidavits as to the facts on which the application relies.” *Arnold v. Arnold*, 285 S.C. 296, 328 S.E.2d 924 (Ct. App. 1985).

In the instant matter, no affidavits executed by the Belins have been filed. Because no affidavits have been filed, there is no evidence presented to the Court which shows a meritorious defense to the foreclosure action. All that is presented to the Court is a motion which alleges that a mobile home owned by the Belins was placed on the Defendants’ property two months after Plaintiff’s mortgage was filed of record.

The Belins assert a possible civil cause of action for adverse possession, but the mere assertion of a possible cause of action does not rise to the level of a meritorious defense. To

prove a cause of action/defense of adverse possession, a party must show that the occupation of the land was (1) actual; (2) open; (3) notorious; (4) hostile; (5) continuous; and (6) exclusive. *Getsinger v. Midlands Orthopedic Profit Sharing Plan*, 327 S.C. 424, 489 S.E.2d 223 (Ct. App. 1997). No affidavit as to any of the adverse possession factors has been filed with the Court. Because no affidavit has been filed with the Court, the Belins fail to show any meritorious defense to the foreclosure action.

Examining the Belins' Motion, they allege that the mobile home was placed on the subject real property in June of 2006. The Plaintiff's Mortgage was filed on April 13, 2006. Because the Plaintiff's Mortgage was filed before the Belins' placed their mobile home on the property, any land which would possibly be adversely possessed would be "subject to" Plaintiff's mortgage. Therefore, even if the Belins' Motion was supported by an affidavit, their adverse possession claim would not rise to the level of a meritorious defense.

Because the Belins have not presented any evidence to the Court supporting their Rule 60(b) Motion, and because any land adversely possessed from the Defendants would be "subject to" Plaintiff's Mortgage, no meritorious defense exists.

2. The granting of the Belins' 60(b) motion would be extremely prejudicial to Plaintiff.

The last payment credited to the Defendant's mortgage account was on November 24, 2017. Since that time, Plaintiff has been paying all escrows for this account in addition to attorney's fees and costs to bringing the underlying foreclosure action and present eviction action. Plaintiff initiated the underlying foreclosure lawsuit by the filing of a Summons, Complaint, and Lis Pendens on September 20, 2018. Since that time, Plaintiff has reviewed the Defendants for possible loss mitigation (which resulted in denial), obtained judgment, completed a public auction, and obtained title to the subject real property.

To allow the judgment to be overturned at this point would be extremely prejudicial. Plaintiff would have to continue to make escrow advances, corporate advances, and pay attorney fees and costs. This is in addition to losing the contractual interest amount as was agreed upon by the Defendants. Because deficiency is waived in the underlying foreclosure, if this property was to go back through the foreclosure process and be resold, there is a very real possibility that the Plaintiff would not be able to recoup the entirety of the judgment amount to which they are entitled.

As was discussed above, there is no merit to the Belins' proffered adverse possession claim. It is much more likely than not that if the Belins' Rule 60(b) Motion is granted, that all parties will be in this exact same position a number of months from now, only having expended much more money and money on needless litigation.

Because of the massive amount of money already expended by Plaintiff, because of the continuing money being lost by Plaintiff, because the Belins' adverse possession cause of action lacks merit, because of the waste of additional money and time that vacating judgment would necessitate, and because all vacating judgment would do is delay proceedings with the same result once litigation is finished, the Plaintiff would be extremely prejudiced by the granting of the Belins' Rule 60(b) motion.

CONCLUSIONS OF LAW

The Belins not entitled to intervention of right nor permissive intervention. The common factor with both intervention of right and permissive intervention is that the intervening party must have an interest in the litigation beyond a mere general interest in the litigation. While the Belins are currently residing in a mobile/manufactured home situated on the real property which is subject of this litigation, they has no legal nor equitable interest in the property.

Additionally, the Belins did not timely apply for intervention. The Motion to Intervene was filed and served over a year after the Plaintiff filed their Lis Pendens, and several months after the subject real property was advertised and sold at public auction.

Any interest that the Belins may have in the subject real property was adequately protected by the Defendants. The Belins' interest in the litigation is the mirror image of the Defendants', and no arguments or defenses could have been raised by the Belins that could not have been raised by the Defendants.

No statute conveys the Belins the right to intervene.

The Belins Motion to Set Aside Judgment is properly considered under Rule 60(b), SCRCF, not the proffered Rule 55, SCRCF. Therefore, under Rule 60(b), SCRCF, the Belins must show a meritorious defense to the foreclosure and the degree of prejudice to the Plaintiff must be considered.

The Belins possible assertion of a future adverse possession claim does not create a meritorious defense. No affidavits have been received by this Court from the Belins as to their possible assertion of adverse possession. Additionally, the Belins state that the mobile/manufactured home was not placed on the subject real property until after the Mortgage was recorded, and therefore any adverse possession would be "subject to" Plaintiff's Mortgage.

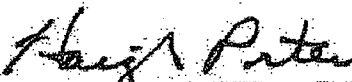
The Plaintiff would be extremely prejudiced if this Court were to grant the Belins' Motion to Set Aside Judgment. The Plaintiff has already lost a significant amount of money during the court of the Defendants' breach and the following litigation; to set aside the sale and Judgment would merely cause the Plaintiff to expend more money while leading to the same result.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the Belins' Motion to Intervene is hereby denied, and;
2. That the Belins' Motion to Set Aside Judgment is denied.

AND IT IS SO ORDERED.

Date: Dec. 27, 2019
Florence, South Carolina



The Honorable W. Haigh Porter
Special Referee for Marion County