

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master in Equity

Appellate Case No. 2019-001821
Circuit Court Case No. 2018-CP-23-3124

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Apr 10 2020

SC Court of Appeals

Rallis Holdings, LLC and Oriole Properties, LLC, Third Party Petitioners,

In RE: Clear Skies Restoration, LLC..... Plaintiff,

v.

Ivan Martinez and Paula A. Martinez..... Defendants,

of which

Oriole Properties, LLC and Rallis Holdings, LLC, are the..... Appellants,

and

Ivan Martinez, Paula A. Martinez, and Clear Skies
Restoration, LLC, are the..... Respondents.

BRIEF OF RESPONDENTS IVAN MARTINEZ AND PAULA A. MARTINEZ

(signature page to follow)

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April 10, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	1
STANDARD OF REVIEW.....	7
ARGUMENT.....	7
1. Did the circuit court, in its discretion, err in setting aside and vacating the foreclosure judgment and subsequent foreclosure sale in this case?.....	7
I. VOID JUDGMENT – LACK OF PERSONAL JURISDICTION.....	7
II. LACK OF PERSONAL JURISDICTION AND VOID UNDERLYING JUDGMENT TRUMPS A BONA FIDE PURCHASER FOR VALUE.....	9
2. Did the circuit court, in its discretion, err in granting Plaintiff/Respondent’s motion pursuant to Rule 60 of the South Carolina Rules of Civil Procedure to correct a mistake in the Order for Judgment and Decree of Foreclosure that was entered on May 8, 2019 in this case?.....	14
CONCLUSION.....	15

TABLE OF AUTHORITIES

CASES

BB&T v. Taylor, 369 S.C. 548, 554-55, 633 S.E.2d 501, 504-05 (2006)..... 7

Belle Hall Plantation Homeowner;s Association, Inc. v. John A. Murray,
419 S.C. 605, 799 S.E.2d 310 (Ct. App.2017)..... 9, 11

Bloody Point Property Owner’s Ass’n, v. Ashton, 410 S.C. 62, 762 S.E.2d 729
(Ct. App. 2014)..... 7, 9, 14

Diedun v. Diedun, 362 S.C. 47, 606 S.E.2d 489 (Ct. App. 2004)..... 9

Fassett v. Evans, 364 S.C. 42, 47-48, 610 S.E.2d 841, 844 (Ct. App. 2005)..... 8

Michel v. Michel, 289 S.C. 187, 190, 345 S.E.2d 730, 732 (Ct. App. 1986)..... 15

Otten v. Otten, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (Ct. App. 1996)..... 14

Pennoyer v. Neff, 95 U. S. 714..... 10

Robinson v. Estate of Harris , 378 S.C. 140, 146, 662 S.E.2d 420, 423 (Ct. App. 2008).... 10, 11

Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006)..... 11, 12

Tobias v. Rice, 379 S.C. 357, 665 S.E.2d 216, 219 (Ct. App. 2008)..... 7, 9, 14

Universal Benefits, 349 S.C. at 183, 561 S.E.2d at 661(1995)..... 7, 10

Ware v. Ware, 390 S.C. 493, 500, 702 S.E.2d 626 (Ct. App. 2010)..... 10

STATUTES

South Carolina Code Section 15-39-870..... passim

S.C. Code Section 20-3-670(A)(1)(a)..... 12, 13

S.C. Code Ann. § 30-7-10..... 12

RULES

Rule 4 SCRCP..... 7

Rule 60 SCRCP..... passim

STATEMENT OF ISSUES ON APPEAL

This case presents two issues on appeal:

1. Did the circuit court, in its discretion, err in setting aside and vacating the foreclosure judgment and subsequent foreclosure sale in this case?
2. Did the circuit court, in its discretion, err in granting Plaintiff/Respondent's motion pursuant to Rule 60 of the South Carolina Rules of Civil Procedure to correct a mistake in the Order for Judgment and Decree of Foreclosure that was entered on May 8, 2019 in this case?

STATEMENT OF THE CASE

I. Clear Skies Restoration, LLC brings its action to foreclose a mechanic's lien.

Clear Skies Restoration, LLC, ("Clear Skies") commenced this case on June 1, 2018, by filing a summons and complaint against Ivan Martinez asserting claims for breach of contract, quantum meruit, statutory attorneys' fees, and to foreclose a mechanic's lien, all arising out of an agreement between Clear Skies and Ivan Martinez for work repairing Ivan Martinez's roof. (Compl. passim (June 1, 2018); R. p. __.) The record indicates that Clear Skies served Ivan Martinez with the initial summons and complaint on July 1, 2018. (Aff. of Service (filed July 3, 2018); R. p. __.) Clear Skies filed an affidavit of default on August 15, 2018 at which time Ivan Martinez had not filed any responsive pleading. (Aff. of Default (Aug. 15, 2018); R. p. __.) Two orders followed: an order for entry of default, and an order referring the case to The Honorable Charles B. Simmons, Jr., Master in Equity for Greenville, to complete the foreclosure. (Order for Entry of Default (Aug. 20, 2018); R. p. __; Order of Reference (Aug. 24, 2018); R. p. __.)

After the case was referred to the Master in Equity, Clear Skies filed an amended summons and complaint on September 26, 2018. (Summons and Amended Foreclosure Compl. (Sept. 26, 2018); R. p. .) The record indicates that the only meaningful change in Clear Skies' pleading was

to add Paula A. Martinez as a named defendant in the case as she is listed along with Ivan Martinez as owner of record on the property subject to Clear Skies foreclosure action. (Summons and Amended Foreclosure Compl. (Sept. 26, 2018); R. p. __.) Clear Skies also filed an amended lis pendens. (Amended Lis Pendens (Sept. 26, 2018); R. p. __.) Clear Skies filed affidavits indicating service of process on Ivan Martinez and Paula Martinez. (Affs. Of Service (filed Oct. 26, 2018); R. pp. __, __.)

Clear Skies then moved for entry of default as to both defendants and filed affidavits of (1) default and (2) non-military service. (Motion for Entry of Default and Exhibits (Dec. 21, 2018); R. pp. __-__; Aff. of Default (Dec. 21, 2018); R. p. __; Aff. of Non-Military Service (Dec. 21, 2018); R. p. __.) Clear Skies also filed a series of public documents - Title to Real Estate, a property tax bill, and an automobile-registration record reflecting that both Ivan Martinez and Paula Martinez had ownership interest in the property at issue. (Exhibits to Motion for Entry of Default; R. pp. __-__.)

On December 31, 2018, the Master in Equity issued an order for entry of default. (Order for Entry of Default (Dec. 31, 2018); R. p. __.) A foreclosure hearing was scheduled for February 7, 2019 in front of the Master in Equity. According to the record, both Ivan Martinez and Paula Martinez were mailed notice of the hearing to the address of Ivan Martinez, the same address as the property subject to the foreclosure action. (Notice of Hearing (Jan. 24, 2019); R. p. __.)

The foreclosure hearing went forward as scheduled. Neither Ivan Martinez nor Paula Martinez appeared. (Foreclosure Hr'g Tr. 2:5-6 (filed Feb. 19, 2019); R. p. __.) Counsel for Clear Skies stated on the record the debt owed, and referenced two senior mortgages on the property and that the payoff amounts for each of the senior mortgages should be announced at the judicial sale, presumably to place any potential buyer on notice that the senior mortgages would need to be

satisfied prior to taking clear title to the property. The court and counsel for Clear Skies discussed this matter off the record. (*Id.* 2:18-3:23; R. p. __.)

On May 8, 2019, the Master in Equity entered a foreclosure order holding that, “The Plaintiff should have judgment of foreclosure of the mechanic’s lien and the property should be ordered sold at public auction after due advertisement...” and 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.” (Order for Judgment and Decree of Foreclosure Sale (May 8, 2019); R. pp. __, __.)

II. The foreclosure sale takes place and Appellants were the successful bidders who paid the purchase price as advertised and received and recorded title to the property.

Notice of the foreclosure sale was advertised for three weeks in the *Greenville News* indicating that the property would be sold at public judicial auction on June 3, 2019. (Aff. of Publication (June 4, 2019); R. p. __.) Ronald Rallis was the successful bidder at the judicial sale and purchased the property for \$120,100. (Aff. of Ronald D. Rallis, Jr. ¶ 9 (filed Sept. 16, 2019); R. p. __.) He subsequently assigned his bid to Rallis Holdings, LLC, and to Oriole Properties, LLC- the Appellants. (Assignment of Bid (filed June 10, 2019); R. p. __.) The Appellants closed this real estate transaction on June 7, 2019, and paid the full price to the Court that same day. (Taxation of

Costs (June 20, 2019); R. p. __; Aff. Kevin Brady , ¶ 6 (Sept. 16, 2019); R. p. __.) The Court issued a Master's Deed signed by the Master in Equity to the Appellants on June 10, 2019. (Master's Deed; R. p. __.) The Appellants recorded their deed the next day. (Id.)

III. Ivan Martinez and Paula Martinez challenged the judicial sale and underlying foreclosure action.

The Master in Equity issued an Order for a Writ of Ejectment authorizing the sheriff to remove Ivan Martinez and Paula Martinez from the property on June 12, 2019. (Order for Writ of Ejectment at 2 (June 12, 2019); R. p. __.) On July 2, 2019 Ivan Martinez filed a pro se motion to stay the ejectment. (Motion to Stay at 1 (July 2, 2019) R. p. __.) A hearing was scheduled for July 17, 2019 in front of The Honorable Charles B. Simmons, Jr., Master in Equity. Prior to the hearing, Ivan Martinez filed a motion for relief from judgment and for a new trial. (Ivan Martinez Motion for Relief from Judgment (July 17, 2019); R. p. __.) Along with the motion, Ivan Martinez filed an affidavit stating he was unaware of the proceedings against him, and that he believed he had never been served with any papers relating to the foreclosure. (Aff. Ivan Martinez, ¶ 9-10 (July 17, 2019); R. p. __.) The hearing commenced on July 17, 2019, however the Master in Equity determined that Clear Skies' presence was required and held the hearing in abeyance in order to allow notice of the hearing to Clear Skies. (Hr'g Tr. 8:19-10:1 (July 17, 2019); R. p. __.)

The hearing was rescheduled for August 1, 2019. Prior to that hearing, Paula Martinez filed a motion for relief from judgment and a motion for new trial asserting that she had never been served with papers related to the underlying lawsuit or the foreclosure sale. (Paula Martinez Motion for Relief from Judgment (July 31, 2019); R. p. __.) Additionally, Paula Martinez stated in her affidavit that she and Ivan Martinez were divorced in 2016 and that since at least 2016 she had maintained another permanent residence and legal address with her new husband. (Aff. Paula Martinez, ¶ 3-4 (July 31, 2019); R. p. __.) At the hearing on August 1, 2019, counsel for Ivan

Martinez and Paula Martinez submitted documents showing that Ivan Martinez and Paula Martinez were in fact divorced in January of 2016, that Paula Martinez had a different residence since at least 2016, a South Carolina Driver's license showing a different address than the property subject to the foreclosure action, and that Paula Martinez had been remarried in 2016. All of these issues were discussed on the record. (Hr'g Tr. 21:20-23:25 (Aug. 1, 2019); R. p. _) Appellants argued at the hearing that their status as bona fide purchasers without notice trumped any of the post judgment objections made by Ivan Martinez or Paula Martinez. (*Id.* 8:15-25 (Aug. 1, 2019); R. p. _) The Master in Equity orally denied the motions made by Ivan Martinez and took the motions of Paula Martinez under advisement. (*Id.* 24:11-20 (Aug. 1, 2019); R. p. _)

While the matter was still under advisement, Clear Skies filed its own post sale motion requesting that the court correct a clerical error and mistake regarding the payment of the proceeds of the sale in the Order for Judgment and Decree of Foreclosure Sale as shown below:

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

FIRST: 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 Plaintiff or Plaintiff's attorney, of the amount of Plaintiff's total 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.

(Rule 60 Motion at 1 (Aug. 21, 2019); R. p. _)

The Appellants opposed the Rule 60 Motion filed by Clear Skies. (Response in Opposition to Rule 60 Motion at 1 (Sept. 4, 2019); R. p. _)

IV. The Master in Equity set aside the foreclosure judgment and judicial sale.

On September 4, 2019, the Master in Equity entered an order granting the post-judgment motions of Paula Martinez and to set aside and vacate the foreclosure judgment ordered by the court and subsequent foreclosure sale and declaring the foreclosure deed void. (Order at 12 (Sept. 4, 2019); R. p. _) The order also granted the request by Clear Skies to correct the language of the Order for Judgment and Decree of Foreclosure Sale and ordered that the parties be allowed to litigate issues pertaining to the underlying action brought by Clear Skies. (*Id.* At 11 (Sept. 4, 2019); R. p. _.)

Following the ruling by the court, and on the same day, the Appellants filed two motions and Clear Skies and Ivan Martinez and Paula Martinez filed a stipulation dismissing this case. (Motion to Intervene (Sept. 16, 2019); R. p. _; Motion to Reconsider (Sept. 16, 2019); R. p. _.) (Stipulation of Dismissal (Sept. 16, 2019); R. p. _) Appellants two motions were as follows: (1) a motion to intervene in the underlying litigation, and (2) a motion to alter or amend the September 4th ruling. (Motion to Intervene (Sept. 16, 2019); R. p. _; Motion to Reconsider (Sept. 16, 2019); R. p. _) The Appellants accompanied those motions with a series of affidavits that explained how they had examined the foreclosure file and the property records to ensure that they would have clear title and status as bona fide purchasers once they received the Master's Deed. (See Aff. of Kevin Brady passim (Sept. 16, 2019); R. pp. _-_; Aff. of Jonathan D. Custer passim (Sept. 4, 2019); R. pp. _-_; Aff. of Ronald D. Rallis, Jr. passim (Sept. 3, 2019); R. pp. _-_) On the same day, Clear Skies and Ivan Martinez and Paula Martinez stipulated to dismissing this case. (Stipulation of Dismissal (Sept. 16, 2019); R. p. _.)

On September 19, 2019, the trial court entered an order granting the Appellants' motion to intervene, but denying Appellants' motion to alter or amend the September 4th order. (Order (Sept. 19, 2019); R. p. _) Appellants then followed with this appeal.

STANDARD OF REVIEW

Whether to grant or deny a motion under Rule 60 “lies within the sound discretion of the judge. *Tobias v. Rice*, 379 S.C. 357, 665 S.E.2d 216, 219 (Ct. App. 2008). “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).

ARGUMENT

1. Did the circuit court, in its discretion, err in setting aside and vacating the foreclosure judgment and subsequent foreclosure sale in this case?

I. VOID JUDGMENT – LACK OF PERSONAL JURISDICTION

“A void judgment is one that, from its inception, is a complete nullity and is without legal effect.” *Universal Benefits*, 349 S.C. at 183, 561 S.E.2d at 661 (quoting *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (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). Respondent, Paula Martinez was not served with the summons and complaint in the underlying action, nor was she served with any papers or pleadings that followed, including those related to the foreclosure judgment and subsequent sale. (Order at 8 (Sept. 4, 2019); R. p._.) 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...” Rule 4(d)(1) South Carolina Rules of Civil Procedure.

The record reflects that Clear Skies attempted to serve Paula Martinez at the property subject to this action. (Affs. Of Service (filed Oct. 26, 2018); R. pp. __, __.) The record also clearly shows that Paula Martinez did not reside at the property subject to the foreclosure and had not since at least 2014, years prior to the commencement of the underlying foreclosure action brought by Clear Skies and that Paula Martinez was remarried and living with her new husband. (Summons and Amended Foreclosure Compl. (Sept. 26, 2018); R. p. __; Hr’g Tr. 21:20-23:25 (Aug. 1, 2019); R. p. __; Order (Sept. 19, 2019); R. p. __.) 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).

The facts of this case establish that Paula Martinez has and had a permanent legal residence in a location other than the property subject to this action since 2016. Therefore, the facts in the record show that Paula Martinez was not served. Consequently, because she was not personally served, the court lacked personal jurisdiction over Paula Martinez and the judgment and sale are necessarily void for lack of personal jurisdiction. As a result, the court, in its sound discretion, set aside and vacated the foreclosure judgment ordered by the court and subsequent foreclosure sale and declared the foreclosure deed void. (Order at 12 (Sept. 4, 2019); R. p. __.) The Master in Equity stated that, “In the Court’s opinion it was simply, under the unique facts of this case, the right and proper thing to do based upon the record presented to the Court at that time of the hearing.” (Order (Sept. 19, 2019); R. p. __.)

Whether to grant or deny a motion under Rule 60 “lies within the sound discretion of the judge. *Tobias v. Rice*, 379 S.C. 357, 665 S.E.2d 216, 219 (Ct. App. 2008). “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). Relief from judgment under Rule 60, SCRCP, rests within the sound discretion of the trial court, and the court’s findings will not be disturbed on appeal absent an abuse of discretion. *Diedun v. Diedun*, 362 S.C. 47, 606 S.E.2d 489 (Ct. App. 2004). The Master in Equity did not err, and did not abuse discretion in finding that the judgment was void.

II. LACK OF PERSONAL JURISDICTION AND VOID UNDERLYING JUDGMENT TRUMPS A BONA FIDE PURCHASER FOR VALUE

South Carolina Code Section 15-39-870 which provides that, “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 value without notice**, notwithstanding such sale may not subsequently be confirmed by the court.” 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?

The answer to the above question comes from analyzing two things, one being “a court of competent jurisdiction” and two being a “bona fide purchaser for value without notice.”

A. “a court of competent jurisdiction”

“A judgment of a court without jurisdiction of the person or of the subject matter is not entitled to recognition or enforcement...or to the full faith and credit provided for in the federal

Constitution...if the court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given.” *Ware v. Ware*, 390 S.C. 493, 500, 702 S.E.2d 626 (Ct. App. 2010). In the case before the court, because the court never established personal jurisdiction over all of the parties, the circuit court was not a court of competent jurisdiction.

The Supreme Court of the United States has, since 1877 recognized the overarching principle behind requiring proper service of process; 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. South Carolina recognizes that a judgment may be set aside if it is void. “The definition of void under the rule only encompasses judgments from courts which fail to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.” *Universal Benefits*, 349 S.C. at 183, 561 S.E.2d at 661 (quoting *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996). In this case, the court never had personal jurisdiction over Paula Martinez. Therefore, the court could not have been, and was not, a court of competent jurisdiction. The underlying judgment was void.

B. “bona fide purchaser for value without notice”

To qualify as a bona fide purchaser for value without notice, 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). Appellants argue they are bona fide purchasers for value (“BFP”). The record indicates

Appellants paid for the property and were also issued a deed that has been recorded and in so doing satisfied requirements 1 and 2 under the BFP analysis. (Order at 10 (Sept. 4, 2019); R. p. _) The third element of the analysis 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).

i. bona fide purchase

The record reflects that Paula Martinez was never served with any papers or pleadings related to underlying foreclosure action. Because she was not served, personal jurisdiction was never established as to Defendant Paula Martinez 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 the case before the court, and despite public policy concerns, Appellants could not have made a bona fide purchase because the sale did not meet the requirements under South Carolina Code Section 15-39-870 nor did they meet all three of the conditions laid out by our courts.

In this case, the court that issued a judgment and held the judicial foreclosure sale and issued a new deed was not a “court of competent jurisdiction” because personal jurisdiction never attached as to Paula Martinez. Accordingly, even if the Appellants did not have notice of a defect in the foreclosure judgment, as they argue, they could not have made a bona fide purchase. The fundamental right to due process and notice of an action against a defendant must be upheld with regard to service of process and lack of personal jurisdiction.

ii. without notice

The bona fide purchaser must show all three conditions — actual payment, acquiring of legal title, and bona fide purchase — **occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property.** *S.C. Tax Commn. v. Belk*, 266 S.C. 539, 543, 225 S.E.2d 177, 179 (1976); *Jones v. Eichholz*, 212 S.C. 411, 422, 48 S.E.2d 21, 25-26 (1948); *Kirton v. Howard*, 137 S.C. 11, 36, 134 S.E. 859, 868 (1926); *Black v. Childs*, 14 S.C. 312, 318 (1880); S.C.Code Ann. § 30-7-10 (Supp. 2004); 2 92A C.J.S. Vendor & Purchaser § 483 (2000). *Spence v. Spence*, 628 S.E.2d 869, 368 S.C. 106 (S.C. 2006). Given the analysis above, Appellants did not satisfy the third requirement of becoming a bona fide purchaser, a bona fide purchase, before having notice of a title defect.

With regard to notice, South Carolina Court have recognized that “constructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed. *Spence v. Spence*, 628 S.E.2d 869, 368 S.C. 106 (S.C. 2006). In this case, the existence of the 2016 divorce file is not disputed. (Hr’g Tr. 11:20-12:7 (Aug. 1, 2019); R. p._.) Appellants argue that the General Assembly anticipated the problem of notice with regard to divorce and resolved it through a statute that holds third parties to be without notice of the impact of divorce proceedings on real property unless a “notice of pendency of action” has been filed pursuant to S.C. Code Section 20-3-670(A)(1)(a). In this case however, the Respondents Ivan Martinez and Paula Martinez were divorced in January 2016. The statute reads, “In a proceeding under this article, either party may record a notice of the pendency of proceedings in the manner provided in civil actions generally, which has the same effect as a notice in civil actions. The rights and interests of each spouse in the other's property

created by this article are not effective against third parties: (a) with regard to any parcel of real property in which an interest under this article is claimed until a Notice of Pendency of Action is filed as provided in Section 15-11-10 with the clerk of court of the county in which such parcel of real property is situated.” S.C. Code Section 20-3-670(A)(1)(a). The proceeding underlying this appeal was not a proceeding under this statute, did not involve divorce, and so this statute does not apply. It makes sense that the General Assembly would require parties to pending divorce proceedings to file a notice of pendency of action to put third parties on notice with regard to real property owned divorce litigants. But in this case, the final divorce decree was entered in January 2016. Logically, this argument and the statute relied upon by Appellants does not apply.

The divorce of Ivan Martinez and Paula Martinez is a matter of public record. The decree establishes that Paula Martinez had an address other than the property subject to this action since 2016 at least. (Hr’g Tr. 11:20-12:7 (Aug. 1, 2019); R. p. _) Therefore, a reasonable and diligent search would have revealed that Paula Martinez did not reside at the same place as Ivan Martinez for all of the reasons previously stated herein. Appellants had constructive notice of a potential title defect. Therefore, Appellants could not have satisfied all of the necessary elements to become a bona fide purchaser.

Because the underlying judgment was void for lack of personal jurisdiction, Appellants could not have ever become bona fide purchasers for value. But even if the court is inclined to say that Appellants satisfy the requirements of a BFP, the fact that the underlying foreclosure judgment is void because the court did not acquire personal jurisdiction over Respondents, trumps any status Appellants might claim as a BFP. The Master in Equity did not err, and did not abuse discretion in determining that the underlying judgment was void and outweighed any claim of the Appellants as being bona fide purchasers, and that in reason and in justice the sale could not be upheld.

2. Did the circuit court, in its discretion, err in granting Plaintiff/Respondent's motion pursuant to Rule 60 of the South Carolina Rules of Civil Procedure to correct a mistake in the Order for Judgment and Decree of Foreclosure that was entered on May 8, 2019 in this case?

Whether to grant or deny a motion under Rule 60 “lies within the sound discretion of the judge. *Tobias v. Rice*, 379 S.C. 357, 665 S.E.2d 216, 219 (Ct. App. 2008). “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). Rule 60(a), allows the correction of clerical mistakes in judgments.” *Otten v. Otten*, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (Ct. App. 1996). The record readily establishes that the intent of Clear Skies and of the court was to have the debt owed, and two senior mortgages on the property and that the payoff amounts for each of the senior mortgages announced at the judicial sale, presumably to place any potential buyer on notice that the senior mortgages would need to be satisfied prior to taking clear title to the property. The court and counsel for Clear Skies discussed this matter off the record. (Foreclosure Hr'g Tr. 2:18-3:23; R. p.)

The court determined, in its discretion that the intent of the court and of Clear Skies was that the order of payment be as follows:

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

FIRST: 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 Plaintiff or Plaintiff's attorney, of the amount of Plaintiff's total 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.

(Rule 60 Motion at 1 (Aug. 21, 2019); R. p. __.)

The Appellants opposed the Rule 60 Motion filed by Clear Skies. (Response in Opposition to Rule 60 Motion at 1 (Sept. 4, 2019); R. p. __.)

Because the change was made to correct a clerical error in the original order, the Rule 60(b) analysis undertaken by Appellants is not necessary. “Clerical mistakes in judgments, orders or other parts of the record and errors therein...may be corrected by the court at any time of its own initiative or on the motion of any party...”*Michel v. Michel*, 289 S.C. 187, 190, 345 S.E.2d 730, 732 (Ct. App. 1986). The Rule 60(b) analysis is not necessary. However, should the court be inclined to view this issue under Rule 60(b), Respondents argue that the circuit court did not err, and did not abuse its discretion in deciding to grant the Rule 60 motion of Clear Skies that, “in the Court’s opinion it was simply, under the unique facts of this case, the right and proper thing to do based upon the record presented to the Court at that time of the hearing.” (Order (Sept. 19, 2019); R. p. __.) The circuit court did not err, and did not abuse its discretion.

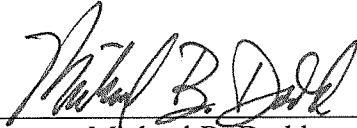
CONCLUSION

Because the underlying foreclosure judgment in this case was void for lack of personal jurisdiction, Appellants could not have ever become bona fide purchasers for value. But even if the court is inclined to say that Appellants satisfy the requirements of a BFP, the fact that the underlying foreclosure judgment is void because the court did not acquire personal jurisdiction over Respondents, trumps any status Appellants might claim as a BFP. The Master in Equity did not err, and did not abuse discretion in setting aside and vacating the underlying foreclosure judgment and judicial sale.

Additionally, the Master in Equity did not err, and did not abuse discretion in granting Clear Skies Rule 60 motion to correct clerical mistakes in the foreclosure order.

For all of the foregoing reasons, Respondents respectfully request that this court affirm the order of the Master in Equity setting aside and vacating the foreclosure judgment and sale.

Respectfully submitted,



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