THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Mikell R. Scarborough, Charleston County Master in Equity

APPELLATE CASE NO. 2018-000118

Bayview Loan Servicing, LLC, ... Appellant,

v.

Patrick A. Oden, Suzanne Oden,
and Hickory Hill Plantation Community Association, ... Respondents.

FINAL BRIEF OF RESPONDENTS

Paul Doolittle
JEKEL-DOOLITTLE LLC
Post Office Box 2579
Mt. Pleasant, South Carolina 29465-2579
(843) 834-4712
Attorney for Respondents Patrick A. Oden
and Suzanne Oden

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

I. Should this Court affirm the Master's denial of Appellant's Rule 60(b)(5) motion where the motion was filed more than two years after the Master issued the original final order of dismissal with prejudice and where the original order of dismissal had no prospective application?

II. Should this Court affirm the Master's refusal to substitute a party plaintiff in a closed action that had been final for more than two years?

STATEMENT OF THE CASE

This appeal arises from the Charleston County Master in Equity's refusal to reopen a long-dismissed foreclosure action to permit a purchaser of a zombie mortgage to substitute itself as the plaintiff and reopen the dismissed foreclosure. (R. pp. 167 – 168, July 18, 2017 Order). The original action was filed in early 2010. (R. pp. 7 – 11, Complaint in Case No. 2010-CP-10-01074). In December of 2014, the Master ordered the original plaintiff-mortgage company (Appellant's predecessor in interest) to turn over insurance proceeds it had been withholding from defendant-borrowers (Respondents herein). (R. p. 76, December 2014 Order). When Appellant's predecessor in interest failed to comply with the Court's Order, the Master dismissed the foreclosure action with prejudice holding that the equitable remedy of foreclosure was no longer available to the mortgage servicer. (R. p. 87, February 4, 2015 Order). No party filed any post judgement motions or appeals. The Final Judgement stood unchallenged and unappealed for more than two years.

In early January 2017, U.S. Bank Trust, an alleged success in interest to the prior mortgage holder/loan servicers, took an assignment of the note and original mortgage. It

then, in April of 2017, more than two years after the original action had been dismissed, filed a motion asking to be substituted as the plaintiff and proceeded to file a Rule 60(b)(5), SCRCP, Motion for relief from judgment claiming essentially that because it had not been the party whose conduct had resulted in the dismissal of the foreclosure action it should be able to resurrect the long dead action. (R. p. 93, April 14, 2017 Motion). It argued that it was "no longer equitable for the previous judgment" to have "prospective application." (R. p. 93, April 14, 2017 Motion).

The Master granted US Bank Trust a hearing on May 10, 2017 and denied both US Bank Trust's Motions. (R. pp. 164 – 165, Transcript, May 10, 2017). The Master issued his written Order on July 18, 2017 stating that it was not appropriate to substitute a party in a closed case, (R. p. 168, July 18, 2017 Order at pg. 2), and denied the Rule 60(b)(5) motion because it was untimely and because there was nothing executory or requiring supervision of changing conduct or conditions by the Court in the 2015 Final order of dismissal with prejudice. (*Id.*)

US Bank Trust filed a Motion for reconsideration under Rule 59(e), SCRCP, on August 10, 2017. (R. pp. 170 – 172, August 10, 2017 Motion). On January 17, 2018, the Master denied the Motion to Reconsider. (R. pp. 174 – 175, January 17, 2018 Order). This appeal follows.

ARGUMENT

Standard of Review

Respondents agree with Appellant that the standard of review in this case is for an abuse of discretion. (Appellant's Brief at pg. 6). The question of whether to grant or deny a motion to set aside a judgment under Rule 60(b) is within the sound discretion of the trial court. Rule 60(b), SCRCP; *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009), *rehearing denied, affirmed in part, reversed in part* 405 S.C. 584, 748 S.E.2d 781; *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009). Relief from judgment rests within the sound discretion of the circuit court, and the circuit court's findings will not be disturbed on appeal absent an abuse of that discretion. *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994); *Honorage Nursing Home of Florence, S.C., Inc. v. Florence Convalescent Center, Inc.*, 367 S.C. 108, 623 S.E.2d 853, (Ct. App. 2005) *rehearing denied, certiorari denied*; *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 399 S.E.2d 779 (1990).

The "reasonable time" limitation in Rule 60(b) is discretionary and should be determined by the trial court under the facts and circumstances of each case. The trial court's determination will not be disturbed absent an abuse of discretion. *Coleman v Dunlap*, 303 SC 511, 402 S.E.2d 181 (Ct. App. 1991).

A trial court has the sound discretion to substitute parties when some act has affected the capacity of a named party to be sued, and its decision will not be reversed on appeal absent a showing of an abuse of discretion. *Bryant v. Waste Mgmt., Inc.*, 342 S.C. 159, 165, 536 S.E.2d 380, 383 (Ct. App. 2000).

I. This Court should affirm the Master's denial of Appellant's Rule 60(b)(5) motion because the motion was filed more than two years after the Master issued the original final order of dismissal with prejudice and because the original order of dismissal had no prospective application.

The Master correctly refused to grant post judgement relief to US Bank Trust whose Rule 60(b)(5) motion came more than two years after final judgment had been entered and because it does not fall properly within the scope of the rule. Appellant's sole justification for its demand to upend an unappealed final judgment more than two years old was its claim that it is "no longer equitable that the previous judgment has prospective application." (R. p. 93, April 14, 2017 Motion). Appellant argued that because it was a successor in interest, the prior judgment should no longer apply. (R. p. 147, lines 16 – 21, May 10, 2017 transcript). Essentially, US Bank Trust bought a mortgage for which the remedy of foreclosure had already been lost by its predecessor in interest and then came before the Court arguing that it should not be bound by the prior the judgment because it had not been the original wrongdoer.

A. The Master did not abuse his discretion in finding Appellant's Motion untimely.

While motions under Rule 60(b)(5), SCRCP, are not subject to the requirement that they be filed within one year of the judgment, they still must be filed within a reasonable time. *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 48–49, 590 S.E.2d 502, 505–06 (Ct. App. 2003); *Evans v. Gunter*, 294 S.C. 525, 528, 366 S.E.2d 44, 46 (Ct. App. 1988). Here, as correctly recounted by the Master in his July 2017 Order, this matter was initially filed in 2010. In December of 2014, he ordered Appellant's predecessor in interest to return insurance proceeds to Respondents it had been holding for almost four years, and, gave it thirty (30) days to do so. He warned Appellant's predecessor if it did

not comply with the Court's order, then the case would be dismissed, and the equitable remedy of foreclosure would no longer be available. Appellant's predecessor failed to comply and so the Master held another hearing in January of 2015 where he issued an Order dismissing the foreclosure case exactly as he said he would. Over a year and half later, in August of 2016, Appellant's predecessor finally tendered the partial insurance proceeds to Respondents. Subsequently, US Bank Trust received assignment of the promissory note and mortgage interest, and then, in April of 2017, more than two years after the original order of dismissal, filed the motions at issue here.

Appellant's argue its delay in seeking relief was not unreasonable because it took its predecessor in interest a year and half after the case had been dismissed to finally do what the court originally ordered, and then, Appellant had to spend time recording the transfer of the interest to itself. These excuses are without merit as the dismissal originated from Appellant's predecessor's original unreasonable delays. A party cannot escape the consequences of its own inequitable conduct by compounding the wrongdoing by additional delay and passing the buck to another entity. As admitted by Appellant at pg. 7 of its Brief, "an assignee stands in the shoes of its assignor." *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct. App. 1999). When Appellant took assignment of the claim, it purchased a note and mortgage that could no longer be foreclosed. Applying the law in the manner Appellant claims is "equitable" would allow any party whose claim has been dismissed with finality to simply assign the claim to a new party in order to revive it. Rule 60(b)(5), SCRCP, is certainly not designed revive any claim that has been dismissed by the mere convenience of substituting a new party.

In *Smith Co.'s of Greenville, Inc. v. Hayes*, 311 S.C. 358, 359, 428 S.E.2d 900, 901–02 (Ct. App. 1993), in an action to foreclose a bond for title given for the purchase of real property, instead of foreclosing the bond for title, the master cancelled the bond and ordered possession be surrendered. Neither party appealed the judgment, but nearly eighteen months after entry of the judgment, the debtor sought relief from judgment under Rule 60(b)(4) and (5), SCRCP. The master denied the motion and the Court of Appeals affirmed because the record revealed no justifiable reason to excuse the delay in seeking to set aside the original judgment.

Appellant, who bears the burden of showing the timeliness of its motion, has failed to offer any argument as to why this Court should find that a more than two-year delay is reasonable other than, "it wasn't us, don't blame us!" Furthermore, while technically it was not Appellant whose action caused the dismissal with prejudice, it was Appellant's choice to purchase a claim for which the remedy of foreclosure had already been lost. This Court should not reward Appellant for its predecessor's continuing delay and misconduct and should certainly not call into question the finality of all judgments dismissed with prejudice. Instead, it should affirm the Master's holding that Appellant's Rule 60(b)(5) motion was untimely.

B. The Master did not abuse his discretion in finding Rule 60(b)(5) inapplicable to this case.

Rule 60(b)(5), SCRCP, provides that judgments may be set aside if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it has been based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." *Perry*, 357 S.C. at 49, 590 S.E.2d at 505; *Saro*, 314 S.C. at 120, 441 S.E.2d at 838 n. 3. Appellant insists that this case fits under

the "prospective application" language of the Rule; however, case law is clear that it does not. As in *Perry*, which was a partition action, the dismissal of this foreclosure action was an executed order because it mandated a one-time change in the relief available to the debt servicer. Just as in *Perry*, as a consequence, the "motion fails for being wholly outside the scope of Rule 60(b)(5)." *Perry*, S.C. at 49, 590 S.E.2d at 505

Also, just as in *Perry*, ruling that an equitable order of dismissal "has prospective application would be inappropriate and an affront to the commonly understood meaning of the term 'prospective application.'" *Id.* The test used to determine whether an order has prospective application is "whether it is executory or involves supervision of changing conduct or conditions by the court." *Id. citing Saro*, 314 S.C. at 120, 441 S.E.2d at 838 n. 3 and *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001). The Order of Dismissal was not one for injunctive relief, and once dismissed the case was over. There was nothing for the Court to monitor or review and there were no circumstances that could happen in the future that could or should change the Master's final decision. Rule 60(b)(5) simply does not apply, and the Master correctly denied Appellant's motion. (R. p. 168, July 18, 2017 Order at pg. 2).

Moreover, while Appellant's brief contains lengthy recitations of acts it alleges took place before and during the original foreclosure action and complains loudly about what counsel for its predecessor in interest should have argued back in 2015, *see e.g.*, pgs. 4-5 of Appellant's Brief, Appellant made none of the factual allegations regarding circumstances existing before the original dismissal of this foreclosure action to the Master in 2017, and, even it had done so, the Master quite properly should have ignored

all such arguments. South Carolina law is clear that Rule 60(b)(5) may not be invoked where the party could have pursued its arguments on direct appeal. *Tench v. S.C. Dep't of Educ.*, 347 S.C. 117, 121, 553 S.E.2d 451, 453 (2001); *Smith Companies of Greenville v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993) (finding relief from judgment is not a substitute for appeal from final judgment, particularly when it is clear party seeking relief could have litigated at trial and on appeal claims he now makes by motion). When Appellant's predecessor in interest failed to appeal the original order of dismissal, it effectively abandoned its right to relitigate under Rule 60(b)(5) the issues that could have been raised in that appeal.

Appellant has offered no persuasive legal or factual reason for this Court to reverse the Master's decision on the Rule 60(b)(5) Motion. Therefore, this Court should affirm the Master's order.

II. This Court should affirm the Master's refusal to permit the substitution of Appellant for the original party-plaintiff in this long closed foreclosure action.

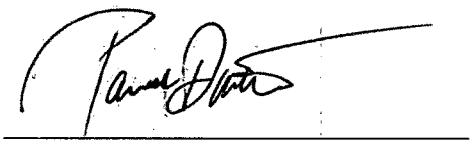
Appellant claims that the Master should have granted its motion to be substituted as the party-Plaintiff in this long closed foreclosure action because it is an assignee of one of the previous loan servicer parties. In support of its argument, Appellant cites Rule 25(e) which states, "Substitution of parties under the provision of this rule may be made by the trial court either before or after judgment, or pending appeal, by the appellate court." While the language of Rule 25, SCRCP, appears to permit post judgment substitution of parties, it only makes sense for the rule to apply in cases where there is still something for the Court to do or to take up such as an appeal or an enforcement action. It makes no sense for the courts to permit successors in interest to substitute

themselves in cases that are already closed with finality. "A trial court has the sound discretion to substitute parties when some act has affected the capacity of a named party to be sued, and its decision will not be reversed on appeal absent a showing of an abuse of discretion." *Bryant v. Waste Mgmt., Inc.*, 342 S.C. 159, 165, 536 S.E.2d 380, 383 (Ct. App. 2000). Here, having denied the Rule 60(b)(5) Motion, the Master quite reasonably refused to permit the substitution of parties because it would have no practical effect and was inappropriate. "Equity will not require the doing of a futile task." *Carmichael v. Dan Nance Corp.*, 274 S.C. 357, 361, 264 S.E.2d 601, 603 (1980); *Elliott v. Dew*, 264 S.C. 40, 46, 212 S.E.2d 421, 423 (1975).

As discussed above, allowing Appellant to be substituted as a new party here despite the fact that it knew or should have known that the foreclosure remedy was no longer available, would open the flood gates to making dismissals with prejudice meaningless. If all a wrongdoer has to do is to sell or assign the claim so the new party could claim that there was no wrongdoing on their part, then no dismissal with prejudice would ever be final. The sole purpose of a dismissal with prejudice is to prevent prospective claims. Belated substitutions of parties would effectively render dismissals with prejudice meaningless if assignment of dismissed claims coupled with substitutions of parties would revive a dismissed claim. Appellant has offered no explanation as to why the Master's decision was an abuse of discretion, and, therefore, this Court should affirm the Master's ruling.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the trial court in all respects.



Paul Doolittle
JEKEL-DOOLITTLE LLC
Post Office Box 2579
Mt. Pleasant, South Carolina 29465-2579
(843) 834-4712
Attorney for Respondents Patrick A. Oden
and Suzanne Oden

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Mikell R. Scarborough, Charleston County Master in Equity

APPELLATE CASE NO. 2018-000118

Bayview Loan Servicing, LLC, ... Appellant,

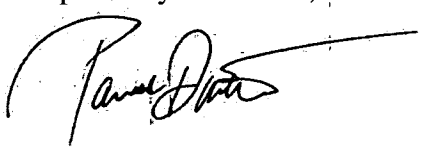
v.

Patrick A. Oden, Suzanne Oden,
and Hickory Hill Plantation Community Association, ... Respondents.

CERTIFICATION OF COUNSEL

The undersigned counsel for Respondents herby certifies that this FINAL BRIEF complies with Rule 211(b), SCACR.

Respectfully submitted,



Paul Doolittle
JEKEL-DOOLITTLE LLC
Post Office Box 2579
Mt. Pleasant, South Carolina 29465-2579
(843) 834-4712
Attorney for Respondents Patrick A. Oden
and Suzanne Oden

October 5, 2018
Charleston, SC