STATE OF SOUTH CAROLINA COUNTY OF ANDERSON Deutsche Bank National Trust Company, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1, Plaintiff, v. Doris J. Dixon; Anmed Health, Defendants.	IN THE COURT OF COMMON PLEAS DOCKET NO. 2015-CP-04-01518 **ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT/ORDER**

This matter came before the Court at a hearing on July 11, 2019, on the Motion to be Relieved from Judgment/Order of Defendant Doris J. Dixon ("Dixon"). For the reasons set forth herein, this motion is denied.

Findings of Fact

On June 24, 2015, Plaintiff Deutsche Bank National Trust Company, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1 ("Plaintiff") filed this foreclosure action. Steven C. Kirven, then a practicing attorney, answered on behalf of Defendant Anmed Heath, who was named a party by virtue of a judgment it held against Dixon.

By Order of Reference entered on October 23, 2015, this action was referred to the Honorable Ellis B. Drew, Jr., Master in Equity for Anderson County.

On November 25, 2015, Judge Drew entered a Judgment of Foreclosure and Sale, which held that Dixon was in default for failing to respond to the Complaint, fully adjudicated Dixon's liability for her default under the terms of the Note and Mortgage at issue, ordered that subject property be sold at a foreclosure sale, and determined that Dixon would be liable for any deficiency remaining on the judgment debt after the foreclosure sale.

Subsequently, the case encountered delays. On May 17, 2016, Judge Drew entered a Supplemental Order Post Judgment for the sole purpose of updating the judgment debt amount due under the previously entered Judgment of Foreclosure and Sale.

Subsequently, Judge Drew retired and was replaced by The Honorable Steven C. Kirven. Thereafter, Judge Kirven entered a Second Supplemental Order Post Judgment on October 17, 2016, a Third Supplemental Order Post Judgment on June 13, 2017, and a Fourth Supplemental Order Post Judgment on December 4, 2017. Each of these supplement orders merely updated the judgment debt amount due under the previously entered Judgment of Foreclosure and Sale.

Defendant Dixon received notice of all of these supplemental post-judgment hearings, but never raised any issue about Judge Kirven hearing the case or needing to recuse himself.

On February 6, 2018, Judge Kirven sold the subject property at a foreclosure sale. On March 8, 2018, the sale became final.

On May 7, 2018, Judge Kirven entered an Order for Deficiency Judgment against Dixon. On May 15, 2018, Judge Kirven entered a Writ of Assistance.

On January 10, 2019, Dixon filed a "Motion to be Relieved from Judgment/Order", complaining that Judge Kirven should have recused himself from this case when he became Master in Equity because he had filed an answer on behalf of Defendant Anmed Health. The motion relied on Cannon 3E.(1) of the Code of Judicial Conduct, Rule 501, SCAR. Dixon claimed that this failure by Judge Kirven to recuse himself constituted "mistake" or "inadvertence" within the meaning of Rule 60(b)(1), SCRCP, and/or rendered the judgments entered herein "void" within the meaning of Rule 60(b)(4), SCRCP, and/or rendered it not "equitable that the judgment should have prospective application" within the meaning of Rule 60(b)(5), SCRCP.

At a hearing on February 6, 2019, Dixon acknowledged that she never appeared at any hearing presided over by Judge Kirven and that there was no actual impartiality in any action taken by Judge Kirven. However, Dixon argued that the provisions of Cannon 3E.(1)(b) constitute a list of situations in which a judge must recuse himself due to the appearance of potential impartiality regardless of whether the judge is or is not impartial as a matter of fact.

On June 5, 2019, Judge Kirven entered an Order finding that he should recuse himself from ruling on Dixon's motion only and that the case should be returned to the Circuit Court for that purpose.

On July 11, 2009, this Court held a hearing on Dixon's Motion to be Relieved from Judgment/Order. By Form 4 order entered on August 21, 2019, the Court held the motion in

abeyance for 60 days to allow the parties time to determine whether any mortgage-relief payments may have been made on Dixon's behalf with respect to the loan at issue in this case.

On October 21, 2019, Dixon filed a Status Report conceding that no mortgage-relief payments were made on her behalf for this loan.

Legal Standard

"Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888-89 (2009).

"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 for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; … (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Rule 60(b), SCRCP.

"The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken." *Id.*

"The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the 'good cause' standard established in Rule 55(c)." *Sundown Operating Co.*, 383 S.C. at 608, 681 S.E.2d at 888-89. "Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." *Id*. "The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default." *Id.*

Conclusions of Law

The Court denies Dixon's Motion to be Relieved from Judgment/Order for the following reasons:

1. **Dixon's motion is untimely with respect to the Judgment of Foreclosure and Sale.**

Dixon filed this motion over three years after Judge Drew entered the Judgment of Foreclosure and Sale on November 25, 2015. To the extent the motion is based on Rule 60(b)(1), it is time barred by the provision prohibiting such motions "more than one year after the judgment."

To the extent that the motion is based on Rule 60(b)(4) and (5), the motion is also untimely as the rule requires that such motions be brought "within a reasonable time." Rule 60(b)(1), SCRCP. Three years is not a reasonable amount of time for Dixon to wait to attack the Judgment of Foreclosure and Sale in light of the fact that she received notice of all of the supplemental post-judgment hearings, never appeared at any hearing before Judge Kirven (prior to the February 6, 2019 hearing on this motion), and never raised any issue about Judge Kirven hearing the case or needing to recuse himself until this motion.

2. Judge Kirven's failure to recuse himself was not inadvertence or mistake because he never served as lawyer with respect to any matter in controversy within this foreclosure action.

Even if Dixon had timely made a motion for relief pursuant to Rule 60(b)(1), the motion would still be denied because Judge Kirven's failure to recuse himself did not constitute "mistake" or "inadvertence" within the meaning of Rule 60(b)(1), SCRCP

Cannon 3E.(1)(b) of the Code of Judicial Conduct, Rule 501, SCAR, provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where … the judge served as a lawyer in the matter in controversy…"

The comments to this section indicate that there are some situations in which it may not be reasonable to question the judge's impartiality even though he participated as a lawyer to some extent in the proceedings prior to becoming a judge.

Judge Kirven's role as an attorney in this case prior to his taking the bench was simply to acknowledge that his client held a previously obtained judgment against Dixon. In doing so, he took no position as to the Plaintiff's claims against Dixon nor any position in opposition to Dixon regarding any defense she may have wished to assert against Plaintiff's claims.

Judge Kirven's involvement in presiding over this action did not begin until the second supplemental hearing which was held on October 12, 2016, almost a year after Judge Drew had decided the merits of the case. Judge Drew had already ruled as to Dixon's default in failing to

respond to the Complaint, Dixon's liability for her default under the terms of the Note and Mortgage at issue, and Dixon's liability for any deficiency remaining on the judgment debt after the foreclosure sale.

Judge Kirven's involvement in presiding over this matter consisted of the supplemental hearings, the resulting orders on October 17, 2016, June 13, 2017, and December 4, 2017, the foreclosure sale, and the routine post-sale matters (deed, report, deficiency judgment, writ of assistance). These actions were largely procedural or administrative in nature and served only to carry Judge Drew's Judgment of Foreclosure and Sale into effect. None of these actions involved determination of the merits of the Plaintiff's cause of action nor Dixon's default.

Aside from the lack of showing of any "mistake" or "inadvertence" in this case, the Court finds that the following additional considerations under Rule 60(b)(1) weigh against granting Dixon relief from judgment in this case: "(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party." *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (internal citations omitted).

a. Dixon did not act promptly to seek relief from the Judgment of Foreclosure and Sale.

As discussed herein *supra*, Dixon's motion is untimely as she waited over three years to attack the Judgment of Foreclosure and Sale despite receiving notice of all of the supplemental post-judgment hearings.

b. Dixon has no meritorious defense to the foreclosure action.

A meritorious defense is sufficient if it is "worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting doubtful evidence." *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) (internal citations omitted). The preferred method of showing a meritorious defense is the submission of a proposed answer, but this showing is not necessarily required. *Savage v. Cannon*, 204 S.C. 473, 30 S.E.2d 70, 72 (1944); *see also Owen v. Reed*, 288 S.C. 133, 136, 341 S.E.2d 629, 630 (1986). Dixon failed to tender a proposed Answer to the foreclosure complaint with her motion or otherwise set forth any defenses she may have had to

this foreclosure; therefore, the Court can only assume that Dixon has no meritorious defense in this case.

c. Plaintiff would be prejudiced by the Court's decision to set aside the judgment and sale.

In determining whether to set aside a judgment, the Court must consider the prejudice to the opposing party if the judgment is set aside. *Rouvet*, 388 S.C. at 309, 696 S.E.2d at 208. Pursuant to the Judgment of Foreclosure and Sale, the subject property was sold on February 6, 2018, and made final on March 8, 2018. Granting Dixon's motion for relief from judgment would prejudice Plaintiff financially if Plaintiff is required to incur the cost and expense of repeating the foreclosure process or some portion of it over two years after the sale was completed.

3. Dixon is not entitled to relief under Rule 60(b)(4).

Judge Kirven's failure to recuse himself did not render any of the judgments or orders void. "A void judgment is one that, from its inception, is a complete nullity and is without legal effect[.]" *Ware v. Ware*, 404 S.C. 1, 11, 743 S.E.2d 817, 822 (2013). "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Id*. "A judgment is not rendered void by irregularities which do not involve jurisdiction." *Id*.

Dixon does not dispute being properly served with process at the outset of this case, does not dispute receiving all hearing notices in this case, and does not dispute receiving notice of entry of all orders and judgments in this case. Dixon does not dispute the validity of the Order of Reference granting jurisdiction to both Masters. Because there is no dispute that Judge Drew and Judge Kirven had personal and subject matter jurisdiction at the time of the entry of the Judgement of Foreclosure and Sale, the subsequent Supplemental Orders Post Judgment, and the Order of Deficiency Judgment, Dixon is not entitled to relief pursuant to Rule 60(b)(4).

4. Dixon is not entitled to relief under Rule 60(b)(5).

Likewise, Dixon is not entitled to relief from judgment under the rarely-applied "no longer equitable" provision of Rule 60(b)(5).

"Because our appellate courts have not definitively addressed Rule 60(b)(5), we have looked to the federal courts' interpretation as our rule is similar to the federal rule." *Auto-Owners*

Ins. Co. v. Rhodes, 405 S.C. 584, 594, 748 S.E.2d 781, 786 (2013). "Our research reveals that this rule has limited application and has rarely been applied." *Id*. (*citing* 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2863 (3d ed. Supp. 2012) (identifying cases where relief has been granted and denied based on Rule 60(b)(5) and stating, this ground is "rarely" relied upon as a basis to allow relief from judgment)).

All of the points previously discussed—the untimeliness of Dixon's motion, the lack of a meritorious defense, the lack of any mistake or inadvertence by Judge Kirven in not recusing himself, the prejudice that Plaintiff would incur—refute any argument that it would be inequitable for Dixon to be bound by all of the judgments and orders entered in this case.

Finally, since Dixon's motion is based solely on Judge Kirven's involvement in this matter, it strains logic to find a basis for setting aside the Judgment of Foreclosure and Sale of Judge Drew which was entered on November 25, 2015, or the first supplemental order entered by Judge Drew on May 17, 2016. Judge Kirven's involvement in the case had absolutely nothing to do with either of those orders. Therefore, the fullest extent of any relief that could be granted to Dixon would be to vacate or set aside any actions taken by Judge Kirven—the second, third, and fourth supplemental orders, the Report of Sale, the Order of Deficiency Judgment, and the Writ of Assistance. However, even if these actions were vacated, it appears the matter would be left in the same posture as existed on June 30, 2016, when Judge Kirven arrived on the bench with Dixon's liability fully adjudicated, a Judgment of Foreclosure and Sale already entered, a sale date in place, and the subject property ready to proceed to sale. Therefore, granting Dixon's motion would be futile.

Conclusion

For the foregoing reasons, Defendant Doris J. Dixon's Motion for Relief from Judgment/Order is denied.

AND IT IS SO ORDERED.

[Court's signature page to follow]

Anderson Common Pleas

Case Caption: Deutsche Bank National Trust Company VS Doris J Dixon , defendant, et al

Case Number: 2015CP0401518

Type: Order/Relief

So Ordered

s/ J. Cordell Maddox Jr.