

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
)
CASE No. 2015-CP-15-454

JOHN MURRAY GIBBS,

Plaintiff,

vs.

HENDERSON GIBBS, JR.,

Defendant.

ORDER

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Nov 05 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS
) FIRST JUDICIAL CIRCUIT
)
CASE No. 2015-CP-18-707

JOHN MURRAY GIBBS,

Plaintiff,

vs.

HENDERSON GIBBS, JR.,

Defendant.

ORDER

THIS MATTER came before me for hearing on the Defendant's Motion to Set Aside Judgment filed July 24, 2020. A hearing was held on August 27, 2020, via Microsoft Teams online conferencing software wherein John T. Kornegay, Esquire, appeared on behalf of Defendant, and Andrew T. Shepherd, Esquire, appeared on behalf of the Plaintiff. The hearing was both conducted and concluded without notice by the participants or the Court of any audio or visual defects.



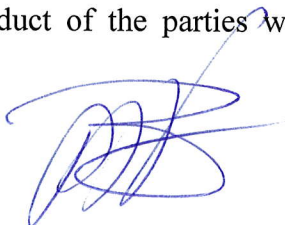
Having considered the arguments of Counsel, the Motion, the record of this case, together with applicable law, I find and conclude that the Motion must be denied.

Plaintiff initiated these actions for partition of three parcels of real property situate in Colleton and Dorchester Counties in April of 2015. I was appointed Special Referee by Orders of Reference entered in both the Colleton and Dorchester County Court of Common Pleas hear both matters in the interest of judicial economy, to take testimony, make findings of fact and conclusions of law, and to enter final judgment.

PROCEDURAL HISTORY

Following entry of Orders of Reference and Appointment of Special Referee, Plaintiff initially scheduled and noticed a final hearing by serving the Defendant with written Notice of Hearing together with the Notice of the right of first refusal required by S.C. Code Ann. § 15-61-25 via U.S. Mail on November 21, 2018 as reflected by the Affidavit of Service filed November 30, 2018. This final hearing was initially scheduled for December 13, 2018 but was continued at the request of the parties.

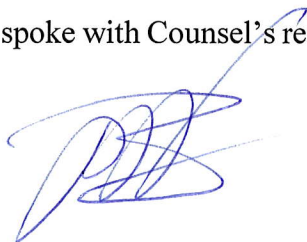
Plaintiff again noticed final hearing by serving the Defendant with written Notice of Hearing together with the Notice of right of first refusal required by S.C. Code Ann. § 15-61-25 via U.S. Mail on April 8, 2019 as reflected by the Affidavit of Service filed April 8, 2019. The final hearing was scheduled for April 22, 2019. At the April 22, 2019, hearing, Plaintiff John Murray Gibbs was present and represented by his attorney, Andrew T. Shepherd, of Summerville, South Carolina. Defendant, Henderson Gibbs, Jr., failed to appear and did not request a continuance from the Court. The Court received testimony of John Murray Gibbs as to the ownership status of the Property, together with its respective characteristics, history, condition, uses, and the conduct of the parties with regard to the same—including the uncontroverted



evidence of the Defendant's longstanding attempts to unilaterally control the same and deny Plaintiff access, income, use, and enjoyment. Of note, the Plaintiff testified as to his inability to reasonably enter and access the property for purposes of obtaining appraisals necessary for completion of the proceedings before me. Upon Motion of Plaintiff's Counsel, the Court granted leave to the Plaintiff to hold the record open in order to obtain appraisals, with further leave to seek such assistance of the Court as may be necessary to command access to the property by Plaintiff's appraiser, William Ford of Appraisal Services of South Carolina, Inc. The Court further directed that upon securing appraisals, the final hearing would reconvene for purposes of receiving additional evidence and testimony, and to enter final judgment.

Plaintiff again scheduled and noticed the final hearing by serving the Defendant with written Notice of Hearing together with the Notice of the right of first refusal required by S.C. Code Ann. § 15-61-25 via U.S. Mail on November 13, 2019, as reflected by the Affidavit of Service filed November 14, 2019. The hearing was scheduled for December 4, 2019. At the hearing, Plaintiff presented evidence through his stepson, Samuel Daniel Cooper, III, and through Plaintiff's wife, Betty J. Gibbs, each of whom appeared and testified as witnesses and on behalf of Plaintiff as Plaintiff's Agents under Durable Power of Attorney, a recorded copy of which was received into evidence. Defendant, Henderson Gibbs, Jr., did not appear or request a continuance from the Court.

The December 4, 2019, hearing was scheduled to begin at 10:00 a.m. However, the Court provided an additional fifteen minutes to allow for the Defendant to appear prior to commencing the hearing in his absence as he was not present at the scheduled time. Plaintiff's Counsel indicated on the record that Defendant had contacted Counsel's office via phone after receiving the Notice of Hearing and spoke with Counsel's receptionist. Notably, although the Defendant did not appear

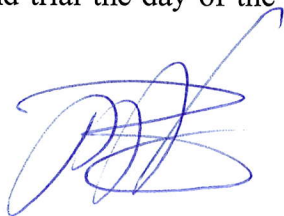


for the hearing, he placed a phone call to the office of the undersigned Special Referee while the hearing was then underway, leaving a voicemail referencing the case. Defendant further contacted the office of the undersigned Special Referee inquiring as to what transpired at the hearing, at which time he was instructed to seek counsel. Throughout the proceedings Defendant was *pro se*.

On December 19, 2019, the Court received Notice of Electronic Filing of a Notice of Appearance by attorney Jeffrey T. Spell on behalf of Defendant. No further motions, notices, or other filings were made in the case until July 17, 2020, when the Final Order was entered by the Clerk of Court following this Court's careful consideration and thorough review of the evidence before it. On July 24, 2020, Defendant's Motion to Set Aside Judgment was filed and served, together with the Notice of Appearance of attorney John T. Kornegay as additional Counsel for the Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Defendant moves the Court to set aside the judgment in this case pursuant to Rule 59 and Rule 60(b), SCRCF, on the basis Defendant's wife had emergency open heart surgery on December 3, 2019, and as a result of the surgery Defendant was unable to travel to and attend the hearing on December 4, 2019. In support of his Motion, Defendant filed as an exhibit thereto a letter dated July 22, 2020 on the stationery of University Hospital Department of Cardiothoracic Surgery of Augusta bearing the names of Renee Frits, P.A.C. and Mark Suzuki, MD, FACS. The letter states that Defendant was unable to be in court on December 4, 2019 to care for his spouse, and further states Defendant's spouse had open heart surgery on December 3, 2019 and was still under the care of Dr. Mark Suzuki, and unable to travel distances and required assistance with all activities of daily living. Defendant also filed an Affidavit in support of his Motion stating he was not able to attend trial the day of the hearing because his wife was in the hospital and required



Defendant's attention and care. Defendant's Motion alleges that but for the emergency, Defendant would have testified and presented evidence contradicting the Plaintiff on the monetary amounts received as rental income and spent on expenses and repairs for the properties at issue. The Court is sensitive to the medical events that affected the Decedent's spouse on December 3, 2019. However, for the reasons more fully stated below, the Court is not inclined to open its judgement, make amendments, direct entry of a new judgment, or relieve the Defendant from the judgment entered July 17, 2020.

2. "[I]n non-jury actions a new trial may be granted for any of the reasons for which rehearings have heretofore been granted in the courts of [this] state." *Blejski v. Blejski*, 325 S.C. 491,480 S.E.2d 462,466 n.4 (Ct. App. 1997); Rule 59(a)(2), SCRPC. Moreover, "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Rule 59(a)(2), SCRPC. The "decision to grant a new trial is left to the sound discretion of the trial court and ordinarily will not be disturbed on appeal." *McAlhaney v. McEveven*, 413 S.C. 299, 303, 775 S.E.2d 411, 413 (Ct. App. 2015), *reh'g denied* (Aug. 20, 2015). "The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). "A party cannot use a motion to reconsider to present an issue



he could have raised prior to judgment but did not." *Anderson Memorial Hosp., Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (*citing C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E. 2d 268 (1993)); *See also Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992).

In the matter before me, Defendant did not appear on December 4, 2019, for the final day of the trial in this case to testify and present evidence which he claims contradicts the Plaintiff on the monetary amounts received as rental income and spent on expenses and repairs for the properties at issue. Defendant alleges his absence on December 4, 2019, was due to his wife's surgery which was performed the day prior to the hearing and his need to be present the following day to assist her in recovery. However, in considering the basis of Defendant's explanation for his absence on December 4, 2019, and whether the same warrants opening the judgment or granting new trial, the Court cannot escape consideration of the Defendant's unexplained absence on April 22, 2019—which is when the final hearing actually convened—as well as certain additional matters that weigh heavily on the Court's assessment of the Defendant's argument and credibility.

As detailed in the Procedural History above, the final hearing could not be fully completed on the date for which it was properly noticed and on which it actually convened on April 22, 2019, due to the Plaintiff's inability to receive reasonable access to the properties for purposes of appraisal. Notably, the properties at that time were under the control and occupation of the Defendant or those acting for him, and it was necessary for the Court to intervene such that the Plaintiff could obtain the appraisals necessary to permit this Court to properly render a decision. Additionally, the Defendant was aware of the December 4, 2019 hearing, and while his wife's surgery and condition would have been a basis reasonably considered by the Court in permitting a continuance had one been requested, the Defendant did not notify the Court at any time.



While the Defendant called the Court and left a voicemail after the hearing had started on December 4, 2019, and further contacted the Court immediately following the hearing to find out what transpired, the Defendant made no mention or provided any correspondence regarding the alleged adverse or emergency conditions that precluded his presence. The Defendant states that the medical event on December 3, 2019, was an emergency, and while there is no doubt it was indeed a serious and severe matter, the physician's letter filed in support of Defendant's Motion does not describe the matter as an emergency or provide any information as to what may have precluded Defendant or someone on his behalf from contacting the Court via phone or through some other means the day preceding the hearing when the surgery took place, or prior to the hearing on the morning of December 4, 2019—much less why Defendant was unable to or did not inform the Court of such an alleged emergency immediately following the final date of the hearing. Given Defendant's unexplained absence from the first date of the final hearing, the delay in the proceedings for reasons reasonably attributable to him or to persons acting for him, and the dilatory nature of noting any form of emergency situation, the Court is not convinced that sufficient basis exists to alter, amend, or enter a new judgment, or that Defendant lacked reasonable opportunity to present his case or evidence.

The undersigned's own record of these cases includes a memorandum of Defendant's December 4, 2019, voicemail message. He missed the "mediation" and could be there in an hour if he could reschedule. He said nothing about his wife's surgery. A copy of that memorandum is submitted with this Order as Court Exhibit 1. The undersigned's record of these cases also includes a memorandum of a telephone conference with Attorney Jeffrey T. Spell on December 11, 2019. Defendant had contacted him. The undersigned directed him to contact Attorney Shepherd. Attorney Spell said nothing about any surgery. A copy of the memorandum of that telephone



conversation is submitted with this Order as Court Exhibit 2. Apparently, as of December 4 and December 11, Defendant's wife's surgery was not an issue that concerned him relative to the December 4 hearing.

2. Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004). A court may relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(1), SCRCP. In determining whether a judgment should be set aside under Rule 60(b)(1), "[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant." *N.H. Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct.App.1993) (quoting *Harry M. Lightsey & James F. Flanagan*, South Carolina Civil Procedure 82 (1985)).

Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses. *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). For the reasons stated above, and in reiteration of the same, given: (1) the Defendant's unexplained absence from the first date of the final hearing whereat he could have presented evidence and for which he had adequate notice, adequate opportunity to appear, the right to introduce evidence, and to confront the Plaintiff; (2) the delay in completing the proceedings for reasons reasonably attributable to him or to persons acting for him; and (3) the dilatory nature of noting any form of emergency situation—together with the lack of evidence as to why a continuance could not otherwise be requested or simple notice given to the Court prior to the final date of hearing or immediately thereafter—the Court is not convinced that sufficient or credible basis exists to set aside the judgment for excusable neglect, or that Defendant did not have adequate opportunity to be present and heard, or to otherwise avail himself of such opportunity had he acted with diligence.



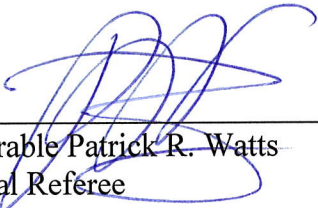
For the foregoing reasons, it is hereby

ORDERED, ADJUDGED and DECREED that Defendant's Motion to Set Aside Judgment is

DENIED.

IT IS SO ORDERED!

October 3, 2020
Summerville, South Carolina



Honorable Patrick R. Watts
Special Referee

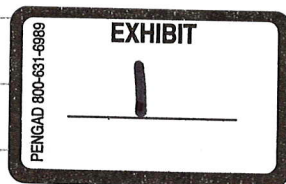
12/4/19

DCI Mr. Gibbs

843-343-3954

* he ~~would~~ missed medication.

* he can ~~be~~ be here in an hour if he can reschedule.



12/11/11

Re Jeff Spell

843-452-3553

he contacted by
Henderson Hubbs

He to contact Andy
Stephens for copy of
proposed orders

