STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
First Reliance Bank,	)	C/A No. 2011-CP-32-01205
Plaintiff,	)	
vs.	)	**ORDER**
Charles E. Bishop, Brett D. Blanks, BCM of Lexington, LLC d/b/a Dam Bar & Grill, B&H of Lexington, LLC and Branch Banking and Trust Company of South Carolina,	)	
Defendants.	)	

INTRODUCTION

Plaintiff and Defendant(s) argued and briefed Defendant(s) Rule 59 and Rule 60 foreclosure appraisal panel appeal of a deficiency judgment. The South Carolina Supreme Court suspended Defendants' appraisal appeal attorney after the appraisal panel appeal trial, but before the trial order was filed and served. Defendant(s) argue his due process rights were violated since neither the Defendants' trial attorney, the appointed Receiver, nor the Plaintiff's counsel sent the Order to his current address and/or neglected to send notice to all defendant(s). The Court agrees a rigorous due process analysis is necessary to protect both Plaintiff's and Defendants' due process rights in this very unusual set of facts.

The parties argued both the motions to alter, amend or reconsider pursuant to Rule 59(e) and to vacate a deficiency appeal Order pursuant to Rule 60(b) on September 9, 2020. After review of the arguments and materials submitted by the parties, the Court denies the Defendants' respective motions.

FINDINGS OF FACT

The following are findings of fact, recited in narrative format, which I find based on all the admissible evidence, and after consideration of applicable legal elements and respective applicable burdens of proof. I have also considered the credibility of the witnesses in reaching these findings.

This Court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences,' nor must this Court "accept as true allegations that contradict matters properly subject to judicial notice….' This Court may consider the complaint, 'documents attached to the complaint….and may properly take judicial notice of matters of public record.' *Martin v. A. Celli Intern., Inc*., U.S. Dis. Ct., D.S.C., Spartanburg Division; May 12, 2014; 2014 WL 1912064 (Internal citations omitted). See also, *J & J Sports Productions Inc. v Latin America Club,* U.S. Dis. Ct., D.S.C. , Spartanburg Division; April 12, 2012; 2012 WL 159 3977; footnote 3.

TIMELINE

March 28, 2011: Foreclosure Summons and Complaint filed.

April 13, 2011: Defendant Blanks served at 137 Bell Chase Drive, Lexington, S.C.

April 13, 2011: Defendant Bishop served at 628 Haskell Road, Gilbert, S.C.

May 13, 2011: Defendant's Attorney Gene Trotter files Answer and Counterclaim.

August 1, 2011: Circuit Court executes FORM 4 Order of Reference.

August 12, 2011: Defendant Blanks moves out of 137 Bell Chase Drive, Lexington, S.C.

October 13, 2011: After phone status conference with parties, MIE Office sends Trial Notice.

January 11, 2012: Foreclosure judgment entered. Page 2 paragraph 8 indicates that at the hearing Defendants counsel withdrew the answer and consented to the foreclosures with $1,482,122.05 debt.

February 6, 2012: Property sold at public auction first sale with the bidding remaining open for 30 days.

March 7, 2012: Sale became final at second sale through an upset bid of $910,000.00 to Samantha Deese/Bentley's Beach House, LLC.

April 2, 2012: Court entered a deficiency judgment of $632,121.09 against the Defendants.

April 3, 2012: Defendants submitted a Petition for Order of Appraisal pursuant to S.C. Code Ann. Sec. 29-3-680(2004) et seq.

April 6, 2012: Plaintiff moved to dismiss the Petition on April 6, 2012.

November 27-December 4, 2012: Court denied the Plaintiff's motion to dismiss and ordered the appraisal to proceed.

The Defendants designated James Petty as their appraiser, the Plaintiff designated Phillip Urso, and the Court designated Kevin McGee.

February 21, 2013: The appraisers returned their written appraisal on February 21, 2013 finding the market value to be $1,040,000.00.

February 27, 2013: Court ordered the return to be filed.

March 5, 2013: Clerk filed the appraisal.

March 15, 2013: Defendants appealed the appraisal panel return.

December 31, 2013: Consent Order to be Relieved of Counsel filed allowing Gene Trotter. Esq. to be dismissed and notes George H. McMaster, Esq. as new attorney for Defendants.

April 10, 2014: the Court heard the appeal. At the hearing, the Defendants presented James Petty as their sole witness. Mr. Petty testified he made a mistake in assessing value to a portion in the back of the property because he believed this portion had limited access. He testified he believed the other two appraisers would agree with him if asked. Both Mr. Urso and Mr. McGee were present for the hearing, but the Defendants did not call them as witnesses. The Defendants presented no other testimony nor argued any other issues at the hearing.

June 12, 2014 (on or about): Both Plaintiff and Defendants attorneys submit their respective Memorandums or Briefs requested by court for consideration in making the ruling.

June 18, 2014: After review and consideration of both submissions, Court issued a decision memorandum directing Plaintiff to provide a proposed order for the Court's consideration.

July 15, 2014: counsel for the Defendants George McMaster notified Plaintiff's counsel he was placed on interim suspension and instructed Plaintiff's counsel to send further correspondence to Peyre Lumpkin appointed as receiver by the South Carolina Supreme Court.

July 31, 2014: Plaintiff's counsel sent a copy of Mr. McMaster's letter to the Court with a proposed order. This letter was copied to Mr. McMaster, Mr. Lumpkin, and the last known address of Mr. Bishop and Mr. Blanks. Only Mr. Lumpkin responded.

July 31, 2014: Receiver email indicated that he had notified the clients of Mr. McMaster's suspension and asked them to retrieve their files, but they had not done so.

October 22, 2014: Court contacted Plaintiff Counsel and Receiver asking if the clients had responded to the letter. Mr. Lumpkin indicated he had no response from the clients.

October 23-27, 2014: Court entered an order denying the Defendants' appeal of the appraisal and entering the appraised value of $1,040,000.00 as the true value of the property. The order indicated that the Court would recalculate the deficiency order and enter a new deficiency order. It also instructed Plaintiff counsel to serve and submit a new deficiency order for consideration.

Plaintiff's counsel sent a copy of the signed order to Peyre Lumpkin as receiver, George McMaster, Charles Bishop and Brett Blanks. The Certificate of Service indicates that Brett Blanks was served at 137 Belle Chase Drive in Lexington, the address he testified to in his deposition. This is also the address Mr. Blanks had on file with the United States Post Office as indicated by the Post Office's March 4, 2015, address form.

November 26, 2014: Amended Deficiency Judgment (based upon Appraisal Panel Order) reduces the Deficiency Judgment from $632,121.09 to $508, 104. 69 (a $124, 016.50 Judgment reduction.)

December 6, 2016: Defendant Charles Bishop conveys property for $34,514.20 to Carolina Farming Company, LLC. Since the Foreclosure Deficiency Judgment has been on record (as modified) the judgment would attach and require a release. "The Recording Act, S.C. Code Sec. 30-7-10 et al., imposes a duty upon a person about to advance money (or other valuable consideration) for the purchase of property to investigate the record before paying the money to the seller. See Castines, Joby C., Deeds of Conveyance (Chapter 12 Deeds and Title Examination at Page 155) (2019 S. C. Bar CLE Division).

January 19, 2017: Case filing contains Partial Release from the Deficiency Judgment of $508, 104.69. The Court notes that the Release contains a description of the property with the derivation clause indicating that the Released Property was sold by Deed of Charles E. Bishop to Carolina Farming Company, LLC on December 6, 2016 as recorded in Deed Book 18863 at Page 183.

Court takes judicial notice that the date of this conveyance by Defendant Bishop is nearly two years after the Amended Deficiency. Obtaining a release from Deficiency Judgment is a step taken on Defendant Bishop behalf so Bishop could convey clear title. Without this release, Carolina Farming Company LLC would have been deeded the property subject to the Deficiency Judgment.

April 30, 2020: Plaintiff requested a transcript of judgment. Russell Fry and Michael Wells both entered appearances for Brett Blanks on the same day and received copies of the request for transcript of judgment.

May 19 & 29th, 2020: Plaintiff filed the *Nulla Bona* return served through electronic filing on Mr. Fry and Mr. Wells.

June 2, 2020: Order of Reference referring case to the Master in Equity filed (also served by electronic filing on Wells and Fry as counsel for Brett Blanks.)

June 4 or 10th, 2020: Bishop filed a direct appeal to S.C. Court of Appeals on June 4, 2020.

June 15, 2020: Plaintiff filed Supplemental Proceeding Petition requesting specific asset information.

June 26, 2020: Attorney Murrell Smith filed an appearance on behalf of Brett Blanks. At Status Conference Defendant counsel represents to Court they were trying to get original file from trial attorney and the Receiver file. They anticipated motions to be filed regarding the October and November 2014 Orders. Defendant(s) file affidavits indicating no receipt of Order.

June 29, 2020: Defendants received the file from the Receiver.

July 9, 2020: Attorney Smith filed the Rule 59(e) and Rule 60 motions.

FORECLOSURE PROCESS

Foreclosure is an equitable action. It is important to understand the foreclosure deficiency judgment process for the due process discussion. South Carolina foreclosure law grants a

deficiency judgment unless it is waived. *Perpetual Buildings and Loan Association v Braun*, 242 S.E. 2d 407 (1978).

The Plaintiff did not waive the Deficiency demand but demanded it.

After litigating the case and the case being set for trial, the parties notified that court they had agreed upon the terms of the judgment and sale. The court entered a judgment submitted by the parties. Page 2 paragraph 8 indicates that at the hearing Defendants counsel withdrew the answer and consented to the foreclosures with $1,482,122.05 debt.

The next step in the process is the first sale. Typically, a bank will determine what it believes the value of the property to be and bid in that amount. That amount is usually well below what the current fair market value is because the Bank gets a credit bid for its debt amount and no more.

In other words, the only time a bank normally demands a deficiency judgment is when the bank believes the property has decreased significantly in value.

To prevent a bank from bidding artificially low at the first sale to perhaps be the only bidder and get the property and a large monetary deficiency judgment, the bidding is reopened thirty days later and the bank cannot bid again.

Anyone can appear to bid a dollar or more over and get the property.

The underlying rationale being that (for example) if word spreads throughout the community that a person can get a $100.00 piece of property for $51 dollars since bank bid $50.00 at first sale, more than one person will show up to bid and hopefully competitive bidding will drive the price up to a more accurate FMV reducing the deficiency judgment or a surplus if bidding is higher than the debt.

Once the court sold the property to the third party upset bidder, the deficiency judgment was amended to lower the judgment amount from the amount defendants and their attorney had consented to when the original order was filed.

Thereafter, defendants can request rights under the appraisal process. After an appraisal panel is established, the three appraisers work together and submit a report to the Court which the Court would review to ensure statutory compliance and then file.

Here, the appraisal panel valuation further lowered the judgment amount.

Our statutory scheme allows for the defendants to appeal this panel finding which they did. This appeal generally leads to a trial where the parties make their respective arguments.

CONCLUSIONS OF LAW

Jurisdiction to Hear Motions During Bishop's Appeal

Codefendant Charles Bishop filed an appeal on June 4, 2020 but did not file a 59(e) or 60(b)(4) motion. Initially, Brett Blanks' 60(b)(4) motion indicated that it was filed on behalf of Brett Blanks and Charles Bishop. At oral argument, however, counsel indicated that Defendant Bishop was not proceeding on the 60(b)(4) motion or the 59(e) motion and these motions were proceeding only as to Defendant Brett Blanks. The pending appeal of Bishop does not deprive this court of jurisdiction to hear Mr. Blanks' post-trial motions.

Even had Brett Blanks appealed the Court's order, this Court would have jurisdiction to hear post-trial motions. Filing a notice of appeal does not deprive the trial court of jurisdiction to consider post-trial motions. *Holmes v. East Cooper Community Hosp*., 408 S.C. 138, 758 S.E.2d 483 (2014). Indeed, "[t]he service and filing of a Notice of Appeal before the filing of timely post-trial motions under Rule 59 by any party does not deprive the lower court of jurisdiction to consider the motions." *Id. (quoting Hudson v. Hudson*, 290 S.C. 215, 349 S.E. 2d 341 (1986)). As argued and presented by both parties, this Court has jurisdiction to rule upon Brett Blanks' motions notwithstanding Charles Bishop's appeal.

RULE 60(b)(4)/ DUE PROCESS

Although the Defendant Brett Blanks filed this motion over five years after the judgment was filed, he argues the motion is timely because he never received the order affirming the appraisal panel denying his appeal. The order was sent to his suspended attorney, the receiver appointed by The Supreme Court, and to the address Blanks testified to under oath, which was also certified by the postal service. Blanks argues the Court should vacate its order pursuant to Rule 60(b)(4) because the judgment is void and should grant his Rule 59(e). Plaintiff argues that over four (4) years has

passed, notice was sent to last known address and both motions should be dismissed as untimely filed and/or on their respective merits.

Neither party disputes that Rule 60(b)(4) allows a court to vacate an order on the basis that it is void. The movant on a 60(b) motion has the burden of proof. *Rouvet v. Rouvet,* 388 SC 601, 696 S.E.2d 204 (Ct. App. 2010). A Rule 60(b) motion must be brought within a reasonable time. *See, McDaniel v. U.S. Fidelity and Guaranty*, 324 S.C. 639, 478 S.E.2d 868 (1996) (finding four years was not a reasonable time for a 60(b) motion.)

Plaintiff argues Defendants should be time barred from Rule 60(b) relief. Initially, the court notes Due Process is a two-sided issue. One could review the facts and find Plaintiff did nothing wrong, and Plaintiff should be entitled to strictly reading the rules to validate its right to due process, and not give the Defendant a chance to retry the case years after the ruling.

After learning of Defendants attorney suspension, the Plaintiff, at direction of Court, sent notice of Order to the Defendant(s) at the same address where they were originally served . Plaintiff also presented evidence it checked with Post Office and verified Defendant(s) had not submitted a change of address form to Post Office.

The notices were returned as not deliverable as addressed—unable to forward.

RECEIVER ACTION ANALYIS

The Court recognizes that if the Receiver notified the Court that Receiver notices had been returned undeliverable, then there may have been better opportunity for further action to ensure proper Rule

31 notice to be sent to the Defendants. The Court further notes there is no Receiver affidavit discussing Receiver actions.

The Court notes, however, that while Defendants state they obtained the trial lawyer file and the Receiver file, the record is not clear if trial attorney, whose office was in Richland, did substantial work in adjoining Lexington County versus Richland County, which would have required Lexington County publication.

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement, Receiver shall

> **(1)** Take custody of the lawyer's active and closed files and trust, escrow, operating and any other law office accounts. The lawyer shall cooperate with the receiver and any attorney appointed to assist the receiver and shall comply with requests to take specific action regarding the client files and accounts. The chair or vice chair may issue such orders as may be necessary to assist the receiver in obtaining custody over such files and accounts, to include orders compelling the lawyer or a third party to take specific action regarding the files and accounts. The willful failure to comply with such an order may be punished as a contempt of the Supreme Court. A party who wishes to challenge such an order must immediately seek review of the order by petition to the Supreme Court;
>
> **(2)** Notify each client in a pending matter, and in the discretion of the receiver, in any other matter, at the client's address shown in the file, by first class mail, of the client's right to obtain any papers, money or other property to which the client is entitled and the time and place at which the papers, money or other property may be obtained, calling attention to any urgency in obtaining the papers, money or other property;
>
> **(3)** Publish, in a newspaper of general circulation in the county or counties in which the lawyer resided or engaged in any substantial practice of law, once a week for three consecutive weeks, notice of the discontinuance or interruption of the lawyer's law practice. The notice shall include the name and address of the lawyer whose practice has been discontinued or interrupted; the time, date and location where clients may pick up their files; and the name, address and telephone number of the receiver. The notice shall also be

> mailed, by first class mail, to any errors and omissions insurer or other entity having reason to be informed of the discontinuance or interruption of the law practice;
>
> **(4)** Release to each client the papers, money or other property to which the client is entitled. Before releasing the property, the receiver shall obtain a receipt from the client for the property;
>
> **(5)** With the consent of the client, file notices, motions or pleadings on behalf of the client where jurisdictional time limits are involved and other legal counsel has not yet been obtained; and
>
> **(6)** Perform any other acts directed in the order of receivership.

Receiver only mailed notice letters to Defendants Blanks and Bishop at 101 Old Orangeburg Road, Lexington, SC 29072 on July 16, 2014. It is unclear how Receiver obtained this address as the last known address of both Defendant Blanks and Defendant Bishop.[1] However, it is clear this was not the correct address for either Defendants Blanks or Bishop because both letters were marked "return to sender – not deliverable as addressed – unable to forward" by the United States Postal Service on July 23, 2014, and returned to Receiver on July 28, 2014.

There is nothing else in Receiver's file to indicate he did anything else to contact Defendant Blanks to give him the required notice of Mr. McMaster's suspension. Receiver did not try to mail notice letters to one of the other addresses found in the file or any other addresses. Receiver also did not seek assistance from the Court or notify the Court in any way that he was unable to contact Defendant Blanks.

Further, Receiver also did not comply with his duty to under Rule 31(2) to notify "*each* client in a

[1] Defendants presented evidence to the Court that there were multiple addresses in Mr. McMaster's file.

pending matter" of Mr. McMaster's suspension by mailing a notice letter "at the client's address shown in the file." Instead, Receiver attempted to mail two of the four clients notice letters to addresses which he quickly discovered were defective. There is no indication Receiver attempted at all to notify Defendants BCM and B&H.

On July 31, 2014, when Receiver emailed the Court and Plaintiff's counsel to say he could neither object nor consent to the proposed order affecting Defendants' rights, he did not inform the Court that the notice letters to Defendant Blanks or Bishop were returned to him as undeliverable three days before or that he did not attempt to mail notice letters to Defendants B&H or BCM. Instead, he merely informed the Court he mailed the notice letters and "he has not contacted us or arranged for his file to be sent to him."

Again, on October 22, 2014, when the Court contacted Receiver to check on the status of the file, Receiver did not inform the Court the notice letters were returned as undeliverable. Instead, Receiver stated "[w]e still have the Bishop file in our possession. He has not responded to our notice letter." The Court relied on Receiver to appropriately perform his duties under Rule 31 and perfect notice on Defendants, and the Court did not realize Receiver did not serve defendants with proper notices until Defendants filed the instant motion.

Pursuant to Rule 31(3), Receiver was required to "[p]ublish, in a newspaper of general circulation *in the county or counties in which the lawyer resided or engaged in any substantial practice of law*, once a week for three consecutive weeks, notice of the discontinuance or interruption of the lawyer's law practice." Rule 31(d)(3) (emphasis added).

Although Receiver published notice, he did not do so until February and March 2015—almost four months *after* the orders in the instant case and seven months after Mr. McMaster's suspension. Furthermore, Receiver only published notice in The Columbia Star, a newspaper in Richland County. Defendants resided in Lexington County, and this case is in Lexington County.

The trial record is not clear if the attorney did substantial practice in Lexington County. While Richland and Lexington Counties are adjoining, that fact alone should not lead the court to conclude a substantial amount of attorney practice would occur in physically adjoining counties.

Rule 31 also requires a court-appointed receiver to take affirmative action to notify all clients of their attorney's suspension from the practice of law to meet fundamental due process requirements. The notice required by Rule 31 requires a receiver to take more action than is required by standard notice by publication pursuant to section 15-9-740 of the South Carolina Code.

Further, Rule 31 also gives a receiver the ability to file notices, motions and pleadings on behalf of an attorney's clients when jurisdiction time limits are involved, as here.

Receiver knew of the impending deficiency judgment being entered against Defendants, knew they did not receive notice of Mr. McMaster's suspension, did not attempt to contact them further to obtain their consent to move to protect their rights, nor notify this court of this issue. Instead, he simply said he would "place a copy of this correspondence in his file for his future reference

Before the hearing, Plaintiff's counsel submitted an affidavit with an affidavit of service attached showing his office served Defendant Blanks with the October 29, 2014 Order Affirming Appraisal

Panel Return at 137 Belle Chase Drive, Lexington, SC 29072. The affidavit of service shows Lynn G. Ivey mailed the Order Affirming Appraisal Panel Return to Defendant Blanks, Defendant Bishop, Mr. McMaster, and Receiver on October 29, 2014.

Plaintiff's counsel also submitted an excerpt from Defendant Blanks' deposition transcript where he testified he resided at 137 Belle Chase Drive. Plaintiff's counsel's affidavit also indicates his office applied to the United States Postal Service for information regarding Defendant Blanks' address and received a response from the United States Postal Service noting "yes rec mail there." Finally, Plaintiff's counsel submitted a screenshot from the South Carolina Secretary of State that Defendant Blanks is a registered agent for service of process for an official South Carolina corporation which lists his address as 137 Belle Chase Drive, Lexington, SC 29072.

The Court finds Plaintiff's counsel appropriately attempted to serve Defendant Blanks with a copy of the Order Affirming Appraisal Panel Return. However, the Court finds Defendant Blanks did not receive notice of the orders in October 2014 or November 2014 because he had not resided at the 137 Belle Chase Drive address since August 12, 2011.

Defendant Blanks submitted an affidavit to the Court with the property deed showing his wife sold the 137 Belle Chase property on August 12, 2011. The deposition referenced by Plaintiff occurred on June 29, 2011, prior to the date Defendant Blanks' wife sold the property.

Plaintiff's counsel also argued that Defendants received written notice of the entry of the orders on April 30, 2020 when Michael H. Wells, Esquire, and Russell W. Fry, Esquire, appeared on behalf of Defendant Blanks by filing an electronic notice of appearance on the e-filing website.

However, the Court finds this filing in Supplemental Proceeding action did not give Defendants notice of these foreclosure deficiency appraisal panel orders issues. On April 15, 2020, Plaintiff initiated supplemental proceedings against Defendant Blanks by filing an execution. This execution was stamped returned N*ulla Bona* from the Lexington County Sheriff's Department on April 24, 2020. Counsel for Defendant Blanks electronically appeared in this action once the supplemental proceedings were filed and needed time to investigate the case and obtain the case files from Receiver. Counsel did not obtain the Receiver's file until June 29, 2020.

Although Plaintiff argued the time period between the 2014 Orders and the motion was not reasonable because over five years passed, the Court notes supplemental proceedings on the November 2014 Amended Deficiency Judgment were not initiated until April 2020 and the case was dormant until then. Defendants did not learn what steps Receiver took to attempt to notify them of Mr. McMaster's suspension and that these steps were deficient until June 29, 2020.

RESPECTIVE PARTY ANALYSIS

While due process procedural rights require personal service of Summons, Complaints and some other documents (RTSC etc.), copies of Order etc. are mailed to last known address.

Why mail and/or publication and not personal service?

The rules may reflect a common sense understanding a party has some obligation to provide current contact information. Otherwise, a party can avoid service of case documents simply by moving, not leaving a forwarding address and later claiming ignorance.

While due process procedural rights require personal service of Summons and Complaints and other court documents (RTSC etc.), copies of Order etc. are mailed to last known address.

A common Equity phrase is "Equity Aids the Vigilant." The trial evidence indicates Plaintiff did all Plaintiff could do. Plaintiff mailed Order as directed by the Court and researched at Post Office to obtain addresses.

The court next considers a paraphrase of what South Carolina Court of Appeals Judge Randy Bell once wrote about an equitable matter 'Who was in best position to avoid this situation?"

The problem arose because Defendants did not furnish forwarding address to the Post Office or by inference—failed to notify his new/second attorney of his new address during the time gap between when Defendant sold his home and moved and attorney suspension (August 2011/home sold—December 31, 2013 McMaster hired as new attorney and –July 15, 2014 Suspension Notice). The record is silent about defendants and second attorney form of communication (Phone, email, fax, personal meetings/consultations) with his clients during this period.

While one might assume a reasonable person in this circumstance would:

1. Contact the Master-in-Equity Court since the person knew that Court had jurisdiction.
2. Hire another lawyer to investigate.
3. Go to Lexington County Clerk of Court to look at file to determine if Order filed.
4. Contact a co-defendant and ask about case.

5. Contact Supreme Court to make enquiry of what to do.

6. Contact Post Office after a move and complete Change of Address form.

The Court does not conclude based on any fact or inference, based on the evidence, that any of the Defendants did these actions.

The answer to Judge Bell's question would seem to be the Defendant(s) created the problem and did not vigilantly act to protect his/their rights.

While there is no persuasive evidence that the Defendant(s) received mailed notice of the orders, the Court is not convinced by Defendants argument they did not have an opportunity to be meaningfully heard related to these orders and judgment, or necessary judicial review of these orders.

The Record shows that Defendants were represented by counsel from the beginning, filing a counterclaim, participating in activity before the Circuit Court prior to Reference to Equity Court, appearing at the trial/hearing, the deficiency sales process through the appeal. This three (3) year period of time was from roughly mid- 2011 until approximately July 15, 2014 when their attorney was suspended from practice of law.

The Court finds Defendants had meaningful opportunity to (a) file their answer and counterclaim (b) participate pre-trial discovery (c) participate in the foreclosure trial and (d) consented to the judgment amount in the foreclosure order (e) participated in choosing the appraisal panel (f)

called a witness and argues at the appraisal panel appeal trial (g) submitted a post- trial memorandum reviewed by the trial court to make trial order ruling.

The decision memorandum sent by the Court to Plaintiff attorney was not a request for both parties to review and to submit a proposed Order. This letter memo was a direction for Plaintiff to submit a proposed Order based upon the court review of both parties earlier submitted memos.

The Court then delayed filing the Order until the Defendant's attorney representation was clarified. Once the Court was notified by Receiver that Defendants had not picked up file and that Plaintiff had also sent copy of filed Order pursuant to Court direction, the Order was filed.

The Defendant's request to void the respective court Orders ignores the thorough manner Defendants trial attorneys participated.

The Court finds Defendants filed this Rule 60(b) motion within a reasonable time after their counsel appeared, obtained Receiver's file, and learned of the due process violation. *See Sijon v. Green*, 289 S.C. 126, 128, 345 S.E.2d 246, 248 (1986) (noting Rule 60(b)(4) motions "must be brought within a reasonable time").

The Court is, however, extremely concerned about how the appraisal appeal attorney's suspension affected time sensitive notices and about the Receiver not clarifying that his notices were returned unclaimed or advising the Court of his difficulty in contacting Defendants

Rule 60(b)(4) allows a court to vacate a judgment which is void. The definition of void encompasses judgments which failed to provide due process, or for which courts lack personal or subject matter jurisdiction. *See, McDaniel v. U.S. Fidelity and Guaranty*, 324 S.C. 639, 478 S.E.2d 868 (1996).

Defendant argues the Court should find a due process violation occurred because Defendants were not given proper notice of the October 27, 2014 Order Affirming the Appraisal Panel and the November 26, 2014 Amended Deficiency Judgment, denying them of their opportunity to be heard in a meaningful way and for judicial review of these orders.

While Defendants case law indicates that in certain circumstances, non-receipt of court orders or process can cause failure of due process, the cited cases facts are not sufficiently similar to warrant the specific relief Defendants requests.

Tyron Fed. Sav. & Loan Asss'n v. Phelps, 415 S.E.2nd 397, 398 (1992) **is** not applicable. Case involved party not consenting to Order of Reference. Here, the Circuit Court referred matter after filing Notice that Plaintiff had withdrawn Motion for Receiver. After perfection of reference, the court held phone status conference to determine when to set the trial.

McDaniel v. U.S. Fid. & Guar. Co., 478 S.E.2d 868,871 (Ct. App. 1996) while cited general principle of law regarding definition of void, the Court of Appeals Court upheld Special Referee finding that waiting four (4) years was too long. This Court agrees that the Defendants, time period for filing Rule 59 Motion did not begin until Defendant attorneys received Receiver file and became aware/put on notice of issue and timely file Rule 59.

Kurschner v City of Camden Planning Comm'n, 656 S.E.2d 346, 350 (2008) is instructive because it was a zoning appeal where landowner argues that the zoning appeal process was fundamentally flawed because failure of one member to recuse and inability to conduct trial – like cross-examination and exclusion of evidence. Court ruled that sufficient due process occurred based upon court examination of facts and the municipality's statutorily granted legislative process. There is no similar claim here that Defendants did not have opportunity to appeal the appraisal or conduct direct or cross-examination during the appraisal panel appeal trial since they were represented by counsel and called a witness and had the opportunity to call other witnesses at that trial.

Universal Benefits, Inc. v McKinney, 561 S.E. 2d 659, 661 (Ct. App. 2002) contains persuasive facts and analysis comparable to this case fact patterns. Employer sued former employee to enforce convent not to compete. Action was dismissed when employer failed to appear at pre-trial conference and roster meeting. Footnote 3 of this opinion notes there was an affidavit by Assistant Sumter County Clerk of Court indicating there was no record that Universal was provided with notice of the August 23, 1999 roster meeting. Court of Appeal upheld trial court action finding, despite no notice of the roster meeting, which resulted in dismissal, the employer had notice and due process rights, once it received the Order. The appellate court noted that the cure for lack of notice was the opportunity to be heard, which would have been a timely filed Rule 59 motion.

A similar fact pattern exists in this case. While Defendant argues Plaintiff is barred from arguing Ruling 59 since it did not timely file, the court is not persuaded and rules that Defendants 'remedy, as that allowed in *Universal* above, is to have the right to argue the Rule 59 motion which this

court now addresses. Such remedy places both Plaintiff and Defendant(s) in the same position they would have been in had the Defendant received the Notice the Receiver or Plaintiff had sent – they could file post Order motions(Rule 59 or 60 etc.) or a straight appeal.

This Court finds that Defendant(s) Rule 60 Motion warrants a ruling that the Defendant(s) due process rights were affected. The remedy is not to void the judgments as Defendants argues, but to allow the Rule 59 Motion to heard on its merits as has been briefed and argued.

The totality of circumstance, evidence, and application of appropriate legal and equitable considerations, warrant due process consideration of the respective party's arguments at the previous motions hearing of the Rule 59 Motion.

RULE 59 ANALYSIS

The Court does not believe the proper due process remedy is to deny Defendant the opportunity to argue its Rule 59 motion because it was untimely filed. Filing a Supplemental Proceeding Action, which is a statutory debt collection action, should not be construed to mean an attorney who represents the Debtor must immediately file various motions(s) motion to challenge the underlying judgment. Once Defendant counsel learned of the issue, counsel professionally and timely acted by requesting the Receiver and attorney file, and promptly filed these two motions.

Defendant Brett Blanks argues the Court failed to appropriately consider the testimony of appraiser Jim Petty that he made a mistake on the appraisal and his belief that the other appraisers made a mistake as well. Mr. Blanks also argued that the Court improperly limited its power to order a new appraisal.

South Carolina Code Section 29-3-770 sets forth the criteria for appraisers to follow. This section requires that the appraisal board consider: (1) sale value; (2) cost and replacement value of improvements; and (3) income production. S.C. Code Ann. § 29-3-720; s*ee, Peoples Federal Sav. and Loan Ass'n v. Myrtle Beach Retirement Group, Inc.*, 302 S.C. 223, 394 S.E.2d 849 (Ct. App. 1990).

The Court apologizes for any original Trial Order confusion leading to conclusion that decision was based upon a mistaken idea that three (3) factors above were the **only matter**s the court could consider.

What the Order meant to convey was that the three (3) factors were the **minimum matters** the court had to address. Meaning, had the order only addressed one or two of the factors, then the Court would have required a new order submitted which addressed all three factors **and any other relevant matters.**

1. Sale Value The appraisers' report specifically states it sets forth the property's market value. The report also specifies that it was performed in accord with the Uniform Standards of Professional Appraisal Practice (USPAP). Mr. Petty's appraisal also purports to follow these standards. (*See* Exhibit 7 Transcript of April 10, 2014). Market value is generally considered the sale price at which a property would be sold in a transaction between a willing buyer and seller. *See, id.* at footnote 1. Therefore, the board of appraisers' report specifies that the appraisers considered sales value when arriving at the true value required by the statute.

In addition, Mr. Petty testified that the board of appraisers considered sales value. (*See* p.19 Transcript of April 10, 2014). Mr. Petty agreed to the value and signed the report. He testified that he later decided that the market value should be recalculated because of a change in access. (*See* p. 20 Transcript of April 10, 2014).

2. Cost and Replacement Value of Improvements

The board of appraisers' report also sets forth the cost and replacement value of improvements. It sets forth the consideration of value:

Front Land (2.357):	$200,000.00
Improvements:	$715,000.00
FF&E:	$100,000.00
Excess Back Land (1.753 acres):	$ 25,000.00

The appraisal report itself sets forth a specific line item for the value of improvements, and no one has questioned it. In addition, it sets forth a value for furniture, fixtures, and equipment (FF&E).

Further, Mr. Petty testified these line items were added at his request. As he said:

> A. Well, Kevin McGee is the one that prepared the letter. And when we first came up with the value, he presented - - or he presented the letter as being one value: a million-oh-forty. And it was my recommendation that we allocated between the values of the land, the improvements, the FF&E, and the excess land. So he went back and re-accomplished the letter. Before he did, we discussed that allocation and came up with our conclusion as to what the allocation was.
> Q. And what was - - that was the allocation of 200,000 for the 2.375 acres.
> A. Correct.
> Q. Improvements of 715,000 - -
> A. Correct.
> Q. - - 715,000, FF&E of a hundred thousand, excess back land at 25,000. Am I correct?
> A. Correct.

(p.7, ll. 3-19, Transcript of April 10, 2014 Hearing).

The board of appraisers' report separately lists the value of improvements, and Mr. Petty testified that the board of appraisers considered the value of improvements in determining the property's true value.

3. Income Production

The Defendants did not question whether the panel considered income production. Nevertheless, the record shows that the board of appraisers considered income production in determining the property's true value.

Mr. Petty's notes show that the panel considered income production. Exhibit 3 reads:

> Income - $1,200,000.00
>
> @ 8% occupancy = 96,000.00
>
> Cap rate @ 9% = 1,066,000.00

Mr. Petty testified these notes documented "the conclusion we came up with in our meeting." (p.13, ll. 13-15, Transcript of April 10, 2014). Mr. Petty also indicated the notes show what "I considered when I came up with my value." (p.18, ll. 3-6, Transcript of April 10, 2014).

Since the Defendants did not challenge the board of appraisers' consideration of income production, there are no further references to it. Mr. Petty's notes, however, show that the board of appraisers considered income production.

Although the Defendants did not argue that the board of appraisers failed to consider "sale value, cost and replacement value of improvements," and "income production," the record shows that the board of appraisers considered these issues. Mr. Petty's testimony, the report itself, and Mr. Petty's notes show that the board of appraisers considered all three factors.

Section 29-3-720 requires that the board of appraisers consider "sale value, cost and replacement value of improvements," and "income production." At the end of the April 10, 2014, hearing, the Court asked the parties to address whether those factors appear in the record. That analysis is above. The Defendants, however, did not argue this issue at the hearing and presented no evidence that the board of appraisers ignored these factors.

Instead, the Defendants only argued that their designated appraiser Mr. Petty made a mistake. They then maintain that his mistake requires another appraisal of the property.

In *Peoples Federal Savings and Loan Ass'n v. Myrtle Beach Retirement Group, Inc.*, 302 S.C. 223, 394 S.E.2d 849 (Ct. App. 1990), the Court of Appeals noted that the board of appraisers must consider sales value, cost and replacement value of improvements, and income production. The Court noted that failure to do so could require a new appraisal. It placed the burden of proving this failure on the party contesting the appraisal. The Court did not analyze whether the board of appraisers considered the statutory factors. Instead, it found that the debtors, as the complaining parties, argued no failure to follow the statutory factors. The debtors did not present the issue for resolution. In the Court's words:

> The developers in this appeal failed to argue their exception relating to the appraiser's consideration of "sales value, cost and replacement value of

> improvements, income production…." Failure to argue an exception constitutes an abandonment of it. *Nelson v. Merritt*, 281 S.C. 126, 128, 314 S.E.2d 840, 841 (Ct. App. 1984).

Id. at 229, 394 S.E.2d at 853.

The Court of Appeals concluded that by not arguing a failure to consider the statutory factors, the debtors had not put the issue before the court, and it ruled for the lender.

Likewise, in *South Carolina National Bank v. S&L Investment Partnership*, 308 S.C. 511, 419 S.E.2d 243 (Ct. App. 1992), the Court of Appeals required the debtors as appellants to introduce evidence that the board of appraisers did not consider the statutory criteria. The debtors appealed from the decision of the board of appraisers because the appraisers did not consider the statutory criteria. To support this argument, the debtors submitted a statement from their chosen appraiser. This statement claimed that the Court's appraiser considered only income production and ignored the remaining statutory factors. The trial court ruled against the debtors, and the Court of Appeals affirmed noting that the appraisers did not testify and no other affidavits were submitted. The complaining debtors established no basis to overturn the appraisal.

As the complaining party, the Defendants must argue their basis for overturning the appraisal and present evidence to support their arguments.

Plaintiff has met it burden of proof to establish the amount due on the Note and Mortgage. S.C. Code Ann. Section 29-3-630 (2007); *America v. Draper*, 405 S.C. 214, 746 S.E.2d 478, (2013), citing *U.S. Ban Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009).

In making findings of facts, the Court must determine whether Plaintiffs met their burden of proof by the preponderance of evidence, simply meaning that the evidence presented by the Plaintiffs, as compared with that opposed to it, has more convincing force and is more than likely true than not true. *Frazier v. Frazier*, 228 S.C. 149, 89 S.E. 2d 225 (1955).

After the parties agreed to debt amount, the deficiency sale process continued, resulting in the sale to the third party as discussed.

Once the appraisal panel issued its report and the Defendants appealed, the burden shifts to the Defendants to prove their defenses, if any. Alex Sander & John S. Nichols, Trial Handbook for South Carolina Lawyers 5th Ed. §9.1 (2015). This is true in foreclosure cases. *See e.g. Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E. 2d 478 (S.C. App. 2013*); U.S. Bank Nat. Ass'n v. Bell*, 385 S.C. 364, 375, 684 S.E. 2d 199, 205 (S.C. App. 2009) ("Generally, the party seeking foreclosure has the burden of establishing the existence of the mortgagor's default on the debt. Once the debt has been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment or accord and satisfaction."); *Moon v. Center*, 133 S.C. 51 (1925) In determining whether either party has met its burden of proof, the Court can weigh, among other things, the credibility of the witnesses providing testimony. *See Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 464, 494 S.E. 2d 465 (S.C. App. 1997).

Defendant(s) presented the testimony of their chosen appraiser Mr. Petty. He testified that he made a unilateral mistake. His testimony was pure speculation since he did not testify that he discussed the matter with the other two appraisers. Defendant had the opportunity to call the other members of the board of appraisers (who were both present to be called as witnesses) to question them to determine if Petty's speculation they (1)ignored the statutory factors or (2) would agree with him they all made a mistake. Defendant chose not to call these witnesses. Further, Petty's own testimony and notes support the conclusion that the board considered the statutory factors.

The Defendants' appraiser Mr. Petty testified that he made a unilateral mistake regarding the acreage being appraised and this mistake should change the value of the appraisal.

The evidence does not show the mistake was made by all three panel members, but just one. Further, the evidence further bears out the fact that the information to discover the alleged mistake existed in the panel member files. Although the appraisal report indicates it includes 4.11 acres (2.357 acres plus 1.753 acres), Mr. Petty testified that he did not pay attention to the report he signed. According to him, this is how he made a mistake on the acreage appraised:

Q. Mr. Petty, you met with the panel, right?
A. I met with the panel. Yes, sir.
Q. And you reviewed the appraisal that you signed under oath, correct?
A. Yes, sir.
Q. And that was based on 4.12 acres, right?
A. I thought it was three-point-six. I didn't pay any attention to the total acreage. When Kevin came back with the letter, he had 4.1. And that's what we signed.
Q. You knew at the time that it was based off 4.1 acres.
A. No, I didn't - -
Q. Well, didn't you just - -
A. - - pay any attention.
Q. - - say Kevin said that?
A. I didn't pay any attention to the 4.1 in the letter. If I had realized that the 4.1 acres included the half acre, that I didn't think was under the ownership, I would have said, "No, wait a minute. Hold on, that's not correct."
Q. Okay. At the time, did you know it was 4.1 acres?
A. No.
Q. Did Kevin tell you it was 4.1 acres?
A. No, sir. We didn't discuss that.
Q. Well, why did you raise the thing about the 4.1 acres?
A. Why did I what?
Q. Why did you raise it - - at the time Kevin said, "It was 4.1 acres, but I wasn't paying attention"?
A. Well, he came back with the letter. And that's what was in the letter. And I didn't - -
Q. It's in the letter - -
A. You can say I didn't read it.
Q. So you didn't read the letter that said 4.1 - -

A. No, I didn't - -
Q. - - acres.
A. - - pay attention that it was 4.1 acres.
Q. You just didn't pay attention to what you signed.
A. Right.
Q. Okay. All right.
A. Which is a mistake.

(p.32, l.3 – p.33, l.19, Transcript of April 10, 2014). In addition to a mistake on acreage, Mr. Petty also testified to a mistake on valuation:

A. No. Well, I might have - - no, I haven't discussed any values with the other appraisers.
Q. Well, when did the value the first time, the front land was valued at $100,000 an acre.
A. Right.
Q. Well, how come it was valued $100,000 an acre, under oath, in February, but now it's worth $200,000 an acre?
A. Because I felt that was worth 300,000. We can't - - collectively, we came up with 200,000.
Q. You signed under oath, that you agreed it was worth $200,000 in February, didn't you?
A. Yeah. But my - -
Q. For 2.37 acres. Right?
A. My opinion is, that this acreage right here is all that's needed for the restaurant.
Q. And it's worth about $100,000 an acre.
A. No, I think - - I thought it was worth 300,000 - -
Q. Well, why did you sign the piece of paper that said you agreed it was worth - -
A. Because I - -
Q. - - $100,000 an acre?
A. - - made a mistake.
Q. Why is it worth $200,000 an acre now, and it was only worth $100,000 an acre a year ago?
A. Because it wasn't a full - - it wasn't a full 2.357 acres. It's less than that.
Q. Aren't you the one who wanted to add the allocation to the - -
A. Yes, sir.
Q. - - return? Does your allocation say 2.357 is equal to $200,000?
A. Because I wasn't paying attention to - -
Q. No, no, that's not my question. My question is: Does the allocation say 2.357 acres is worth $200,000?
A. Yes.

Q. And today you're saying that number should be almost $500,000?
A. Based on the fact I made a mistake. Yes, sir.

(p.36, l.2 – p.37, l.15, Transcript of April 10, 2014 Hearing).

There was no testimony that the other appraisers made a mistake, and the Defendants did not call the other appraisers to testify. In addition, Mr. Petty did not testify that any fraud took place to deceive him. He simply testified that he did not review the report he signed and that he made a mistake in signing it.

In general, a mistake can be grounds to reform a legal document, but only if it is a mutual mistake, and the complaining party shows this by clear and convincing evidence.

> Before equity will reform an instrument, it must be shown by evidence which is most clear and convincing not simply that it was a mistake on the part of one of the parties but that it was a mutual mistake. *Belin v. Strikeleather*, 232 S.C. 116, 101 S.E.2d 185 (1957). A mutual mistake is one where both parties intended a certain thing and by mistake in the drafting did not get what both parties intended.

Sims v. Tyler, 276 S.C. 640, 642, 281 S.E.2d 229, 230 (1981).

Mr. Petty's testimony shows that he made a mistake. A unilateral mistake by the Defendants' chosen appraiser does not invalidate the decision of the three-person board of appraisers. If it did, no contested statutory appraisal could go forward as the debtor's chosen appraiser could block any appraisal by claiming unilateral mistake.

Further, Mr. Petty's failure to review the appraisal report he signed is not a basis to invalidate the appraisal. "One who is capable of reading and understanding but fails to read a contract before signing is bound by the terms thereof." *Id.* (citing *Evans v. State Farm Mut. Auto. Ins.*, 269 S.C.

584, 587, 239 S.E.2d 76 (1977)). Likewise, as the Defendants' chosen appraiser, Mr. Petty is bound by the terms of the appraisal report and cannot now invalidate the appraisal with the claim he did not read the two-page document he signed.

While there are no reported cases in which a member of the board of appraisers disavows an appraisal he signed, South Carolina courts have addressed the issue of a differing opinion by a minority appraiser. In *South Carolina National Bank v. S&L Investment Partnership*, 308 S.C. 511, 419 S.E.2d 243 (1992), the debtors attempted to invalidate the majority appraisal by arguing that the Court's appraiser did not consider all the statutory factors. They submitted a statement from their chosen appraiser. This statement indicated that the Court's appraiser believed the only relevant factor to consider was the income production capability of the property. Thus, they argued the Court's appraiser violated the appraisal statute by failing to consider sales value and costs and replacement value of improvements. The Court of Appeals noted that the other appraisers did not testify or submit affidavits. It affirmed the trial court's refusal to order another appraisal.

In *First Citizens Bank and Trust Co. v. Overlook, Inc.*, 286 S.C. 473, 334 S.E.2d 146 (1985), the Court of Appeals affirmed a majority appraisal against the challenge of the debtor. The minority appraiser testified that he relied on the value of mineral deposits in reaching his value of $187,500. The majority appraisers returned a true value of $18,000. The debtor attempted to call its president to bolster the report of the minority appraiser. The trial court sustained the lender's objection because the testimony was cumulative, and the Court of Appeals affirmed. The trial court and the Court of Appeals affirmed the appraisal agreed to by only two of three appraisers.

Likewise, the Defendants have only presented the testimony of Mr. Petty. He testified that he no longer agrees with the report of the board of appraisers which he signed. There has been no testimony that the two remaining appraisers agree with Mr. Petty, that the appraisers ignored the statute, or that the report departs from sound appraisal practice. Assuming everything Mr. Petty says is accurate, he is a minority appraiser, and he has put forth no reason to invalidate the report of the board of appraisers.

This Court denies Defendant(s) Rule 59 Motion because Defendant failed to meet his evidentiary burden of proof that a mistake occurred, or that a majority or all of the panel members agreed a mistake occurred or that the Court considered only the three statutory factors in making its ruling.

AND IT IS SO ORDERED.

James O. Spence
Lexington County Master In Equity

Judge's Signature Page to Follow

Lexington Common Pleas

Case Caption: First Reliance Bank VS Charles E Bishop

Case Number: 2011CP3201205

Type: Master/Order/Other

AND IT IS SO ORDERED.

S/JUDGE JAMES O. SPENCE-3068