THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
James O. Spence, Master-in-Equity

Case No. 2011-CP-32-01205

Appellate Case No. 2020-001580

First Reliance Bank,

Respondent,

v.

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,

Of whom Brett D. Blanks, BCM of Lexington, LLC d/b/a Dam Bar & Grill, and B&H of Lexington, LLC are Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

G. Murrell Smith, Jr., SC Bar No. 66263
Shanon N. Peake, SC Bar No. 102723
Smith Robinson Holler DuBose
and Morgan, LLC
2530 Devine Street
Columbia, SC 29205
murrell@smithrobinsonlaw.com
shanonp@smithrobinsonlaw.com
(803) 254-5445 – telephone
(803) 254-5007 – facsimile

Michael H. Wells, S.C. Bar No. 68341
Russell W. Fry, S.C. Bar No. 100084
Coastal Law LLC
1314 Second Avenue
Conway, SC 29526
mwells@coastal-law.com
rfry@coastal-law.com
(843) 488-5000 - telephone

Frank B. McMaster, S.C. Bar No. 9073
Frank B. McMaster P.C.
1708 Richland Street
Columbia, SC 29201
Djmcmaster34@gmail.com
(803) 569-6773 – telephone

ATTORNEYS FOR APPELLANTS

RECEIVED
May 14 2021
SC Court of Appeals

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES AND RULES

ARGUMENT

I. This Appeal Is Proper Because Appellants' Motions Were Timely

In its Brief, Respondent argues Appellants are barred from bringing this appeal because they filed their motions pursuant to Rules 59(e) and 60(b) of the South Carolina Rules of Civil Procedure five years after the master-in-equity's October 27, 2014 Order affirming the appraisal panel return. (Resp. Br. p. 4–5). However, as the master-in-equity found, Appellants' motions were timely because they were made within 10 days—a reasonable time—from the date Appellants obtained the Receiver's file, which contained the October 2014 Order. (Nov. 4 Or. pp. 9, 19, 22; R. at ___).

First, the time prescribed for making a motion pursuant to Rule 59(e) does not hinge on the date of the order. Instead, the timeliness question under Rule 59(e) centers around the date an aggrieved party received written notice of the order. *See* Rule 59(e), SCRCP ("A motion to alter or amend the judgment shall be served not later than 10 days after *receipt of written notice of the entry of the order*." (emphasis added)). Appellants timely moved for relief pursuant to Rule 59(e) on July 9, 2020, as they did not receive written notice of the entry of the October 27, 2014 Order Affirming Appraisal Panel Return or the November 26, 2014 Amended Order of Deficiency Judgment until June 29, 2020, when Appellants obtained possession of the Receiver's file.

Respondent argues Appellants should have filed their Rule 59(e) Motion by November 13, 2014, citing Respondent's counsel's affidavit that his office mailed a copy of the October 2014 Order to Appellant Brett Blanks ("Blanks"). (Resp. Br. p. 5). However, as discussed in Appellants' Brief, Blanks did not receive written notice of the October 2014 Order because he had not resided at the address Respondent used for over four years at that time. (App. Br. pp. 4, 7–8, 13, 19–20). Further, there were no attempts to serve the October 2014 Order on Appellants BCM

of Lexington, LLC d/b/a Dam Bar & Grill ("BCM") and B&H of Lexington, LLC ("B&H") and no attempts to serve any of the Appellants with the November 2014 Amended Deficiency Judgment. Respondent further argues "Blanks provided no other addresses." (Resp. Br. p. 5). However, Respondent cites no authority for its proposition that Blanks, a party who is represented by counsel in an action, was required to provide other addresses to Respondent. Respondent ignores the fact that Blanks was unaware of his counsel's suspension from the practice of law because the Receiver failed to fulfill his duties under Rule 31, RLDE, to notify Appellants of the suspension or take any action to protect Appellants' rights.

Second, Rule 60(b)(4) does not set forth a strict timeframe for moving for relief. Instead, Rule 60(b)(4) requires an aggrieved party to move for relief "within a reasonable time," presumably within a reasonable time after the party discovers a violation of their due process rights occurred and that an order is void. *See McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) (finding the "reasonable time requirement applies to Rule 60(b)(4)"). Respondent cites to *McDaniel* to argue that the period of "nearly six years" in the instant case is unreasonable because the *McDaniel* court found that a period of four years was unreasonable. (Resp. Br. p. 5–6). However, an analysis of whether a Rule 60(b)(4) motion is timely requires a fact-specific, case-by-case determination, and the *McDaniel* court did not hold that any Rule 60(b)(4) motion made after four years was automatically unreasonable.

Further, *McDaniel* is factually distinct from the instant case. In *McDaniel*, the plaintiff negotiated and entered into a settlement agreement with the defendant. *Id.* at 641, 478 S.E.2d at 869. The terms of the settlement agreement "were incorporated into the trial judge's order" on October 16, 1990. *Id.* Almost four years later, on June 20, 1994, the plaintiff filed a Rule 60(b)(4) motion seeking to set aside the October 16, 1990 order on the grounds that it was void. *Id.* The

special referee denied the plaintiff's motion, finding that it was not made within a reasonable time. *Id.* This Court upheld the finding that the motion was not made within a reasonable time, noting that appellate courts will not reverse a trial court's determination on whether a motion was made within a reasonable time absent an abuse of discretion. *Id.* at 644, 478 S.E.2d at 871. As the special referee based its decision on the facts that the plaintiff "participated in the settlement, received substantial benefits from it, and utilized § 38-77-940 [of the South Carolina Code] as the basis for a cause of action in his 1989 complaint," this Court upheld the special referee's determination that the motion was untimely. *Id.* This Court further held that, even if the motion was timely, "any problems which may exist" with the order did not fall into the definition of void pursuant to Rule 60(b)(4) and were merely voidable. *Id.* at 644–45, 478 S.E.2d at 871.

This is entirely inapposite from the instant case, where Appellants were not given required notice of the orders affecting their rights or of their attorney's suspension from the practice of law. Appellants moved to set aside the October and November 2014 orders within ten days of obtaining the Receiver's file and discovering that a due process violation occurred. While Respondent makes much of the fact that Appellants did not move until 2020 to set aside orders from 2014, Respondent conveniently leaves out the fact that it did not attempt to initiate supplemental proceedings or collect on the void judgment until 2020. As the master-in-equity found, "the case was dormant [from November 2014] until" April 2020 and Appellants "did not learn what steps [the] Receiver took to attempt to notify them of Mr. McMaster's suspension and that these steps were deficient until June 29, 2020." (Nov. 4 Or. p. 16; R. at ___). Because the master-in-equity's finding was properly supported by evidence in the record, the master-in-equity did not abuse his discretion in finding Appellants' Rule 60(b)(4) motion was timely. Accordingly, this appeal is properly before the Court.

II. The Corporate Entity Appellants Were Not Properly Served With The Orders Affecting Their Rights

In its brief, Respondent argues the master-in-equity did not err in denying Appellants' Rule 60(b)(4) motion because Appellants were properly served with the October 2014 and November 2014 Orders. (Resp. Br. 6–7). In support of their argument that a single letter addressed solely to Blanks at an incorrect address accomplished service on the corporate entities BCM and B&H, Respondent cites to (1) an affidavit of Blanks where he testified he is the president of BCM and B&H and (2) the fact that Appellants were represented by the same attorney. (Resp. Br. p. 7; July 27, 2011 Aff. of Brett Blanks; R. at ___). Respondent further argues that, even if the letter did not accomplish service on the corporate entities, service was accomplished by mailing the order to the Receiver who stood in the place of Appellants' suspended attorney. (Resp. Br. p. 7).

As discussed in *McCall*, "[t]he plain language of [Rule 5(a) of the South Carolina Rules of Civil Procedure] requires that *each* party shall be served separately." *McCall v. IKON*, 363 S.C. 646, 655, 611 S.E.2d 315, 319 (Ct. App. 2005). Respondent argues the Court should excuse its failure to appropriately serve each defendant with the October 2014 Order because Blanks–who did not even receive the mailed copy of the October 2014 order–was associated with the corporate entities and had the same counsel as the corporate entities. However, as indicated in *McCall*, "[t]he need to properly serve *each party individually* does not arise from an arcane or highly technical application of the rules" but "an *essential* function." *Id.* (emphasis added). Unlike in *McCall* where a party mailed "one letter addressed to both defendants," the mailing sent by Respondent's counsel here was not even addressed to BCM or B&H, only Blanks. Further, both corporate entities have registered agents listed with the South Carolina Secretary of State that could have been utilized by Respondent. These corporate entities are separate and distinct from Blanks, and South Carolina law requires service on each defendant individually. Further, there is no evidence

in the record that service of the November 2014 Amended Deficiency Judgment was even attempted on any of the Appellants, as there are no certificates showing service and the Clerk of Court's office noted the Judgement was mailed only to Respondent's counsel and Mr. McMaster. (Am. Def. Jud.; R. at ___).

The fact that Appellants were represented by the same counsel does not excuse service on each defendant individually. Instead, it simply means that each defendant could individually be served by and through their attorney. However, Respondent's argument here illustrates the exact reason Appellants moved for relief pursuant to Rule 60(b)(4). Respondent argues that service was accomplished on Appellants because Respondent's counsel "served the [R]eceiver in place [of] the attorney." (Resp. Br. p. 7). Although the Receiver did receive a copy of the October 2014 Order, and even the proposed order before the master-in-equity signed it, the Receiver informed the master-in-equity that he did not "assume representation of [Mr. McMaster's] clients but [his role is to] merely take possession of client files to facilitate their return to clients or to new counsel." (Ex. F to Rule 59(e) and 60(b) Mot.; R. at ___). The Receiver failed to do even that limited role.

The right to have an attorney of one's choosing is an important right in our adversarial system. *See Hagood v. Sommerville*, 362 S.C. 191, 197–98, 607 S.E.2d 707, 710 (2005) (finding an order granting motions to disqualify a party's attorney is immediately appealable as the right to have an attorney of one's choosing is a substantial right). Similarly, the right to be notified of an attorney's suspension from the practice of law is also an important and substantial right. Our Supreme Court has put procedures in place to ensure litigants receive this notice and have an opportunity to obtain new counsel of their choosing, all while ensuring that their fundamental due process rights are protected. Unfortunately, this procedure was not followed in this case and

directly impacted Appellants' due process rights, resulting in the October 2014 and November 2014 orders being void.

CONCLUSION

For the reasons stated above, as well as those stated in Appellant's previous brief, Appellant respectfully requests the Court reverse the circuit court and vacate the order and judgment pursuant to Rule 60(b)(4), or, in the alternative, remand for a new appraisal.

RESPECTFULLY SUBMITTED,

s/ Shanon N. Peake
G. Murrell Smith, Jr. (S.C. Bar # 66263)
Shanon N. Peake (S.C. Bar #102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, Third Floor
Columbia, South Carolina 29205
(803) 254-5445
murrell@smithrobinsonlaw.com
shanonp@smithrobinsonlaw.com

Michael H. Wells (S.C. Bar #68341)
Russell W. Fry (S.C. Bar #100084)
Coastal Law LLC
1314 Second Avenue
Conway, SC 29526
(843) 488-5000
mwells@coastal-law.com
rfry@coastal-law.com

Frank B. McMaster (S.C. Bar #9073)
Frank B. McMaster P.C.
1708 Richland Street
Columbia, SC 29201
(803) 569-6773
Djmcmaster34@gmail.com

ATTORNEYS FOR APPELLANTS

May 14, 2021.