THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. J. Cordell Maddox Jr., Circuit Court Judge

Common Pleas Case No. 2015-CP-04-01518

Appellate Case No. 2020-001253

DEUTSCHE BANK NATIONAL TRUST COMPANY, as certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1,

Respondent,

v.

DORIS J. DIXON and ANMED HEALTH,

Defendants,

Of Whom Doris J. Dixon is

Appellant.

Initial Brief of Appellant

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2. Where the Master-in-Equity previously served as counsel of record in a case before presiding over the case, was his failure to have recused himself a "mistake" that allows his orders and judgments to be set aside under R. 60(b)(1), SCRCP?

3. Where the Master-in-Equity previously served as counsel of record in a case before presiding over the case and where a party has since objected, should relief have been awarded under R. 60(b)(5), SCRCP, because it is no longer "equitable that the judgment should have prospective application"?

STATEMENT OF THE CASE

The Master-in-Equity summarized many of the relevant proceedings as follows:

> 1. On May 31, 2013, Steven C. Kirven, then a practicing attorney, commenced an action on behalf of AnMed Health seeking collection of an unpaid hospital bill against [Doris] Dixon and Steve M. Dixon by the filing of a summons and complaint and subsequent service of same on the Defendants in an action entitled AnMed Health v. Doris Dixon and Steve M. Dixon, Civil Action No. 2013-CP-04-01273 ["Hospital Action"];
>
> 2. Neither Defendant in the Hospital Action answered or otherwise appeared resulting in an affidavit of default being filed on August 22, 2013, and a default judgment being granted by the Honorable Alexander S. Macaulay, Circuit Judge, which was entered in the records of the Anderson County Clerk of Court on August 27, 2013;
>
> 3. Almost two years later, on June 24, 2015, this action ["Foreclosure Action"] was commenced for the foreclosure of a mortgage by the filing of a summons and complaint and subsequent service thereof in an action and titled as captioned above herein;
>
> 4. The Plaintiff's attorney in the Foreclosure Action served the summons and complaint and related documents on Dixon personally on July 3, 2015 according to affidavit of service by Perry Thomas which was filed on July 8, 2015;
>
> 5. Steven C. Kirven, while still a practicing attorney, served and filed an answer on July 6, 2015, on behalf of AnMed Health admitting the allegations in the foreclosure complaint regarding AnMed Health's previously obtained judgment;
>
> 6. On October 23, 2015, the Plaintiff's attorney in the Foreclosure Action filed an affidavit of default as to Dixon;
>
> 7. By order dated October 23, 2015, the Foreclosure Action was referred to the Anderson County Master-in-Equity who was, at that

time, the Honorable Ellis B. Drew, Jr.;

8. On November 23, 2015 a hearing was held in the Foreclosure Action before Judge Drew which was attended by Dixon and which resulted in an Order of Foreclosure and Sale signed by Judge Drew on that date which was entered in the Clerk's office on November 25, 2015;

9. On May 16, 2016, a supplemental hearing was held in the Foreclosure Action before Judge Drew, which was not attended by Dixon despite notice and which resulted in a Supplemental Order of Foreclosure and Sale being issued by Judge Drew dated May 16, 2016 and entered in the Clerk's office on May 17, 2016;

10. By Order dated June 28, 2016, issued by Judge Drew, Steven C. Kirven was relieved as the attorney for AnMed Health in the Foreclosure Action and substituted in his place was Attorney William E. Phillips;

11. On June 30, 2016, Steven C. Kirven [hereinafter "Judge Kirven"] became the Master-in-Equity for Anderson and Oconee Counties, Tenth Circuit, upon the retirement of Judge Drew;

12. On October 12, 2016, a second supplemental hearing in the Foreclosure Action was held before Judge Kirven which was not attended by Dixon despite notice and which resulted in a Second Supplemental Order of Foreclosure and Sale being issued by Judge Kirven on October 12, 2016 and entered in the Clerk's office on October 17, 2016;

13. On June 13, 2017, a third supplemental hearing in the Foreclosure Action was held before Judge Kirven which was not attended by Dixon despite notice and which resulted in a Third Supplemental Order of Foreclosure and Sale being issued by Judge Kirven on June 13, 2017 and entered in the Clerk's office that same day;

14. On February 6, 2018, after publication of the required notice of sale, the initial sale of the subject property in the Foreclosure Action was held at which the Plaintiff submitted its bid in the amount of

$18,765.00 with the bidding held open for thirty (30) days thereafter because the Plaintiff was seeking a deficiency judgment;

15. On March 8, 2018, the bidding was reopened and the final sale held at which time no new bids were received thus making the Plaintiff the high bidder for the subject property;

16. By instrument dated March 22, 2018, the Plaintiff assigned its bid to Bosco Credit II, LLC, which assignment was later filed with the court on May 3, 2018;

17. On March 26, 2018, after full compliance, a Master's Deed was issued to Bosco Credit II, LLC, and subsequently recorded on April 11, 2018, in the Office of the Register of Deeds for Anderson County in Book 13324 at Page 45;

18. On May 7, 2018, a Report on Sale and Disbursements and Order Confirming Sale was issued by Judge Kirven and filed;

19. On May 7, 2018, an Order for Deficiency Judgment against Dixon in favor of Bosco Credit II, LLC, in the amount of $28,280.18 was issued by Judge Kirven and filed;

20. On May 15, 2018, a Writ of Assistance requested by Bosco Credit II, LLC, was issued by Judge Kirven and subsequently served on Dixon;

21. On December 11, 2018, [a] *Pro Se* motion was filed by Dixon;

22. On December 17, 2018, a notice of hearing on the motion which was scheduled for January 16, 2019, was sent to the parties;

23. On January 10, 2019, [a] Rule 60(b) Motion was filed on behalf of Dixon by her attorney, Howard W. Anderson, III....

[6/5/19 Order of Recusal]. Only Ms. Dixon's counseled R. 60(b), SCRCP motion is at issue in this appeal. In that motion, she sought to set aside the judgment

and all non-moot interlocutory orders because Judge Kirven served as counsel for AnMed in this action. [1/10/19 R. 60(b), SCRCP Motion].

Judge Kirven recused himself after the hearing on the R. 60(b), SCRCP Motion, [6/5/19 Order of Recusal], and the case was returned to the Circuit Court.

Following a hearing, Judge Maddox denied all relief, on August 31, 2020, rejecting Ms. Dixon's claims that Judge Kirven's failure to have recused himself entitled her to relief under R. 60(b)(1), (4), and/or (5), SCRCP. [8/31/20 Order Denying Relief]. Ms. Dixon timely served her notice of appeal on September 17, 2020. [Notice of Appeal].

STANDARD OF REVIEW

"In an appeal from an action in equity, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *Pinckney v. Warren*, 344 S.C. 382, 387 (2001) (citation omitted). Questions of law are likewise subject to *de novo* review. *See, e.g., Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564 (2008) (citation omitted).

ARGUMENT

I. The Master-in-Equity Lacked Jurisdiction to Preside in a Case Where He Had Previously Served as Counsel of Record.

Among the reasons that a final judgment or order can be set aside is that "the

judgment is void." R. 60(b)(4), SCRCP. "[J]udicial proceedings are void, when the court in which they are taken is acting without jurisdiction, either as to the subject matter or the parties." *Ruff v. Elkin*, 40 S.C. 69, 77-78 (1893). Likewise, a judgment is void when the court that issued it "failed to provide proper due process." *McDaniel v. United States Fid. & Guar. Co.*, 324 S.C. 639, 644 (Ct. App. 1996). (citations omitted). Facts establishing a "void" judgment "appear[] upon the face of the record," while facts establishing a merely voidable judgment "must be shown by evidence outside of the record." *Hankinson v. Charlotte, Columbia & Augusta R.R. Co.*, 41 S.C. 1, 18 (1894).

The Circuit Court erred as a matter of law in concluding that Judge Kirven had jurisdiction to preside over this case given his prior involvement. "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*...." Canon 3(E)(1)(b), CJC, R. 501, SCACR (emphasis added).

Here, "[t]he pertinent facts in this matter are all readily ascertainable from the court records on file in the office of the Clerk of Court for Anderson County...." [June 5, 2019, Recusal Order p.1]. Prior to assuming the bench Judge Kirven successfully sued Ms. Dixon on behalf of AnMed, [*Id.* pp. 1-2]. He then appeared on

behalf of AnMed in the foreclosure proceedings below. [*Id.* p. 2; AnMed Answer]. His prior service as counsel for a litigant in the matter is a specifically enumerated cause for mandatory disqualification.

Given the now mandatory language used in the Code of Judicial Conduct—"shall disqualify himself or herself," Canon 3(E)(1), CJC, R. 501, SCACR—and given the importance of maintaining public confidence in the impartiality of the judicial system, Judge Kirven should have recused himself *sua sponte*. *See, e.g.*, *Ryals v. State*, 914 So. 2d 285, 286 (Miss. App. 2005) (collecting cases allowing appellate review where judge had previously served as prosecutor in the case, even without objection below, "because the duty to avoid the appearance of impropriety overrides any waiver" (citations omitted)); *Adams v. State*, 601 S.W.2d 881, 884 (Ark. 1980) (*sua sponte* recusal required for familial relation to litigant under Code of Judicial Conduct and thus pro-se litigant's failure to have objected was "immaterial"). *See also Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (vacating arbitration award where arbitrator did not *sua sponte* disclose small pecuniary interest, even absent any claim that actual impartiality resulted because "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias"). Further, even if Judge Kirven's recusal somehow required a motion, Respondent's and/or AnMed's

counsel, as officers of the Court, should have alerted Judge Kirven to the issue. *See Friends of the Chattahoochee, Inc. v. Longleaf Energy Assocs., LLC*, 684 S.E.2d 632, 635 (Ga. 2009) (urging members of the bar to alert a justice to any overlooked case in which the justice's wife's law firm was representing a party so that the justice could recuse himself because "it is imperative that the public have faith and trust in the impartiality of the justice system" (citation omitted)).

Where a judge should have recused himself but did not, the judge's actions must be set aside regardless as to whether they were or were not correct on the merits.[1] *See Ledford v. Dep't of Pub. Safety*, 428 S.C. 387, 392 (2019) (finding recusal required and not engaging in harmless-error analysis). *See also, e.g., Degarmo v. State*, 922 S.W.2d 256, 267 (Tex. App. 1996) ("The grounds for disqualification are expressly set out in the Texas Constitution. If a judge is disqualified under the constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void and subject to collateral attack." (citation omitted)); *Blaisdell v. City of Rochester*, 609 A.2d 388, 391 (N.H. 1992) (declining to implement a harmless-error test because "it would be inconsistent with the goals of our code to require certain standards of behavior from the judiciary in the inter-

[1] Ms. Dixon does not contend that Judge Kirven displayed actual impartiality in his rulings. The issue is one of mandatory recusal as an enumerated instance of appearance of impartiality.

est of avoiding the appearance of partiality, but then to allow a judge's ruling to stand when those standards have been violated"); *Tatum v. S. Pac. Co.*, 58 Cal. Rptr. 238, 240 (Ct. App. 1967) ("[I]t is no answer to say that the judgment was correct because the statute does not say that the judge is disqualified to decide erroneously but that he shall not decide at all.... [T]he judgment is void...." (citations omitted)).

Judge Kirven confirmed a judicial sale of Ms. Dixon's home for $18,765.00, [May 7, 2018, Order Confirming Sale], which left her not only without a home, but with a deficiency judgment entered against her for $28,280.08. [May 7, 2018, Deficiency Judgment]. "Courts must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments." *People v. Dist. Court of Third Judicial Dist.*, 560 P.2d 828, 831-32 (Colo. 1977) (quotation and footnote omitted)). This Court ought not approve of Judge Kirven's orders, especially given that the need for disqualification was not even close, despite the lack of any objection from any party until undersigned counsel's Rule 60 motion. *Cf. Neal v. Honeywell Inc.*, 191 F.3d 827, 830 (7th Cir. 1999) ("This is something in which the judicial system is vitally interested..... [Appellant's] failure to stand on a procedural objection therefore is not dispositive. Sometimes the

judiciary must act in self-defense.").

Insofar as the Circuit Court thought that Ms. Dixon's motion had not been filed "within a reasonable time," R. 60(b), SCRCP, the Circuit Court was wrong there, too.[2] As the Circuit Court itself noted, Ms. Dixon "never appeared at any hearing before Judge Kirven (prior to the February 2019 hearing on [the Rule 60(b) motion])." [8/31/2020 Order Denying Relief at 4]. Thus, there was not a time when she appeared in court and saw Judge Kirven but remained silent. By contrast, Respondent's counsel repeatedly did appear in court and thus was (or reasonably should have been) aware of the obvious problem with Judge Kirven's involvement. It ought not be said that Ms. Dixon's objection, with the benefit of counsel, should have been a surprise to Plaintiff.

All of Judge Kirven's orders should, therefore, be vacated.

II. The Master-in-Equity's Failure to Have Recused Himself Despite Having Served as Counsel of Record in the Proceedings Was an Actionable "Mistake" on His Part.

The Circuit Court should have also set aside all of Judge Kirven's orders and

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[2] This Court has recognized that South Carolina decisions are in conflict about whether a motion asserting voidness is subject to any time limit. *See McDaniel*, 324 S.C. at 639. While acknowledging the conflict, that published decision holds that time limits do apply. *Id.* "[B]ecause a void judgment is a nullity," *Gatling v. Beach Palace, Inc.*, 294 S.C. 464, 464 (Ct. App. 1988), Ms. Dixon respectfully submits that any time is a reasonable time.

judgments on the grounds that they were the product of "mistake" R. 60(b)(1), SCRCP. Motions asserting these grounds must be brought within a reasonable time not to exceed one year after entry. *Id.* Ms. Dixon's motion was sufficiently timely and meritorious.

As indicated in Point I, Ms. Dixon brought her motion, with the assistance of counsel, within a reasonable time and, in any event, before the one-year hard deadline, R. 60(b)(1), SCRCP.

Judge Kirven's continued participation was a mistake. As he himself noted in his order of recusal, he "has made it his habit in foreclosure actions which include a subordinate lienholder formerly represented by him to so advise defendants who appear at the merits hearing before him and provide opportunity for that defendant to object to his hearing and deciding the merits of the case." [6/5/19 Order of Recusal at 9]. And when defendants do object, he recuses. [*Id.*] Thus, even he recognizes that it is not appropriate to preside over a case without the specific consent of the litigants. *See* Canon 3(F), CJC, R. 501, SCACR (allowing a judge to preside who is otherwise subject to recusal only after disclosure to the parties and an "agreement [of the parties that is] ... incorporated in the record of the proceeding." But his "mistake" here was not disclosing and obtaining on-the-record consent from all parties, including Ms. Dixon, before presiding. *See id.*

Furthermore, no real prejudice would accrue to Respondent from vacating Judge Kirven's orders. After all, Respondent could have alerted Judge Kirven to the obvious problem but did not. Further, the costs that Respondent incurred in connection with the original foreclosure sale were minimal. *See* [5/3/18 Affidavit of Additional Costs (listing costs for commission and sale)].

All of Judge Kirven's orders and judgments should, therefore, be vacated.

III. It Is Inequitable for the Master-in-Equity's Judgment to Continue to Stand.

The Circuit Court also erred in not vacating the Master-in-Equity's deficiency judgment under R. 60(b)(5), SCRCP. That provision allows relief whenever "it is no longer equitable that the judgment should have prospective application." *Id.*

While the Circuit Court is correct that use of R. 60(b)(5), SCRCP, is "rarely-applied," [8/31/20 Order Denying Relief at 7], Ms. Dixon respectfully submits that it is rare for a judge to not recuse himself in an action where he has previously appeared as counsel for a party, given the prohibition set forth in the Code of Judicial Conduct.

To whatever extent that Judge Kirven was allowed to preside in the absence of an objection from Ms. Dixon, she has now objected. Given the strong public policy at stake in promoting the appearance of fairness in the judicial system, it is no

longer equitable to allow his orders to stand, particularly given that Respondent could have raised the issue with Judge Kirven and thereby avoided the problem.

All of Judge Kirven's orders and judgments should, therefore, be vacated.

CONCLUSION

This Court should reverse the denial of Rule 60 relief below, vacate all orders and judgments signed by Judge Kirven, and remand for further proceedings in the circuit court.

Dated this 1st day of June, 2021, at Pendleton.

DORIS J. DIXON

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