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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

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 the .....Appellant.

INITIAL BRIEF OF THE RESPONDENT

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July 30, 2021

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STATEMENT OF THE CASE

This is an appeal by a mortgage foreclosure defendant from a Circuit Court judge's order denying her relief from a series of ministerial and procedural orders entered after the foreclosure judgment by the Master in Equity, whom she contends should have *sua sponte* recused himself before entering those orders.

On June 24, 2015, Respondent Deutsche Bank National Trust Company, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1 ("Respondent") filed this mortgage foreclosure action against Appellant Doris J. Dixon ("Dixon") and Defendant AnMed Heath ("AnMed"), the holder of a judgment against Dixon from a prior lawsuit (Complaint.) On July 6, 2015, Steven C. Kirven, Esquire, then a practicing attorney, filed a relatively generic Answer on behalf of AnMed. (Answer.) The Answer took no position with respect to the allegations in Respondent's Complaint other than acknowledging the lien of AnMed's judgment against the subject property and took no position with respect to any defenses that Dixon may have had to the foreclosure. (*Id.*)

On October 23, 2015, Respondent filed a Certificate of Default and Non-Military Service stating that Dixon was in default for failure to plead or otherwise respond to the Complaint. (Cert. Default and Non-Military Serv.)

On October 23, 2015, the Clerk of Court entered an Order of Reference referring this case to the Honorable Ellis B. Drew, Jr., Master in Equity for Anderson County. (Ord. of Reference.) On November 23, 2015, Judge Drew held a final foreclosure hearing. (Record of Hr'g.) Only Respondent's foreclosure counsel and Dixon attended this hearing. (*Id.*)

On November 25, 2015, Judge Drew entered a Judgment of Foreclosure and Sale, which held that Dixon was in default for failing to respond to the Complaint, fully adjudicated Dixon's

liability for her default under the terms of the promissory note and mortgage at issue, ordered that her property be sold at a foreclosure sale, and determined that Dixon would be liable for any deficiency remaining on the judgment debt after the foreclosure sale. (J. of Foreclosure and Sale.)

Subsequently, the case encountered delays. On May 16, 2016, Judge Drew held a supplemental hearing (Record of Suppl. Hr'g), after which he entered a Supplemental Order Post Judgment for the sole purpose of updating the judgment debt amount due under the previously entered Judgment of Foreclosure and Sale. (Suppl. Order Post J.)

Subsequently, Judge Drew retired and was replaced by The Honorable Steven C. Kirven. On June 28, 2016, Judge Drew entered an Order Substituting Counsel that took judicial notice of the appointment of Judge Kirven as the Master in Equity, relieved him as counsel for AnMed in this action, and substituted William E. Phillips, Esquire, as counsel for AnMed in his place. (Order Substituting Counsel.)

Thereafter, on October 12, 2016, Judge Kirven held a second supplemental hearing (Record of Suppl. Hr'g), after which he entered a Second Supplemental Order Post Judgment on October 17, 2016. (Second Suppl. Order Post J.) On June 13, 2017, Judge Kirven held a third supplemental hearing (Record of Suppl. Hr'g), after which he entered a Third Supplemental Order Post Judgment on June 13, 2017. (Third Suppl. Order Post J.) On December 4, 2017, Judge Kirven held a fourth supplemental hearing (Record of Suppl. Hr'g), after which he entered a Fourth Supplemental Order Post Judgment on December 4, 2017 (Fourth Suppl. Order Post J.). Each of these supplement orders merely updated the judgment debt amount due under the previously entered Judgment of Foreclosure and Sale.

Dixon received notice of all of these supplemental hearings and that Judge Kirven would

be the presiding judge over them (Appellant's Br. p. 3; Notices of Suppl. Hr'g), but failed to appear at any of them and never complained that Judge Kirven needed to recuse himself. (Records of Suppl. Hr'gs.)

On February 6, 2018, Judge Kirven sold the subject property at a foreclosure sale, at which Respondent was the successful bidder. (Report on Sale and Disbursements and Order Confirming Sale.) On March 8, 2018, the sale became final and Judge Kirven issued a deed to Respondent. (*Id.*) On May 7, 2018, Judge Kirven entered a Report on Sale and Disbursements and Order Confirming Sale (*Id.*) as well as an Order for Deficiency Judgment against Dixon. (Order for Deficiency J.) On May 15, 2018, Judge Kirven entered a Writ of Assistance. (Writ of Assistance.)

All six of the orders entered by Judge Kirven in this case—the Second Supplemental Order Post Judgment, the Third Supplemental Order Post Judgment, the Fourth Supplemental Order Post Judgment, the Report on Sale and Disbursements and Order Confirming Sale, the Order for Deficiency Judgment, and the Writ of Assistance—are collectively referred to hereafter as "Judge Kirven's Orders."

On January 10, 2019, Dixon filed a "Motion for Relief from Judgment/Order", complaining that Judge Kirven should have recused himself from this case when he became Master in Equity because of his prior involvement in the case as counsel for AnMed. (Mot. for Relief from J./Order.) The motion contended that Judge Kirven's failure to *sua sponte* recuse himself pursuant to Cannon 3(E)(1)(b) of the Code of Judicial Conduct constituted "mistake" or "inadvertence" within the meaning of Rule 60(b)(1), SCRCP, and/or rendered Judge Kirven's Orders "void" within the meaning of Rule 60(b)(4), SCRCP, and/or rendered it not "equitable that the judgment should have prospective application" within the meaning of Rule 60(b)(5),

SCRCP. (*Id.*) Dixon's motion sought relief from not only Judge Kirven's Orders, but also from the Judgment of Foreclosure and Sale and First Supplemental Order Post Judgment entered by Judge Drew. (*Id.*)

At a hearing on the motion on February 6, 2019, Dixon acknowledged that she never appeared at any hearing presided over by Judge Kirven and conceded that Judge Kirven had not shown any actual partiality in this case. (Order p. 6.) However, Dixon argued that the provisions of Cannon 3(E)(1)(b) constituted a list of situations in which a judge must recuse himself regardless of whether the judge's impartiality may be reasonably questioned under the circumstances. (*Id.*)

On June 5, 2019, Judge Kirven entered an Order setting forth the reasons why his disqualification was not mandatory under Cannon 3(E)(1)(b) (Ord. p. 6), giving assurances of his impartiality (Ord. p. 10), questioning the timeliness and merits of Dixon's motion (Order p. 8), but ultimately concluding that he should recuse himself only from ruling on Dixon's motion. (Order p. 12.) He returned the case to the Circuit Court for the purpose of hearing and deciding Dixon's motion. (*Id.*)

On July 11, 2019, the Circuit Court held a hearing before The Honorable J. Cordell Maddox, Jr., on Dixon's Motion for Relief from Judgment/Order. (Order.) By Order entered on August 21, 2019, Judge Maddox held the motion in abeyance for 60 days to allow the parties time to determine whether any mortgage-relief payments may have been made on Dixon's behalf with respect to the loan at issue in this case. (*Id.*) On October 21, 2019, Dixon filed a Status Report conceding that no mortgage-relief payments were made on her behalf for this loan. (Status Report.)

On August 31, 2020, Judge Maddox entered an Order Denying Defendant's Motion for

Relief from Judgment/Order on the grounds that: 1) Dixon's motion was untimely, 2) Judge Kirven's failure to recuse himself did not constitute "mistake" or "inadvertence" within the meaning of Rule 60(b)(1), SCRCP; 3) Judge Kirven's failure to recuse himself did not render any of the judgments or orders void under Rule 60(b)(4), SCRCP; 4) Dixon was not entitled to relief under the rarely-applied "no longer equitable" provision of Rule 60(b)(5), SCRCP, and 5) Dixon's motion was futile because vacating Judge Kirven's Orders would not change the outcome of the foreclosure. (Order.)

On September 17, 2020, Dixon served and filed a Notice of Appeal from Judge Maddox's Order Denying Defendant's Motion for Relief from Judgment/Order.

On September 23, 2020, Dixon filed a Motion for Stay Pending Appeal, requesting a stay of the enforcement of the Writ of Assistance during this appeal. (Mot. Stay Pending Appeal.) On January 12, 2021, the Circuit Court held a hearing before The Honorable R. Lawton McIntosh on the Motion for Stay Pending Appeal of Defendant. (Order Setting Terms of Supersedeas Bond.)

On January 15, 2021, Judge McIntosh entered an Order Setting Terms of Supersedeas Bond and Conditions of Appellate Stay, which gave Dixon 30 days to either file a bond with two sureties or deposit cash with the Clerk of Court in the amount of $15,000 in order to stay Respondent's enforcement of the Writ of Assistance. (Order Setting Terms of Supersedeas Bond.)

Dixon failed to comply with the conditions of the Order Setting Terms of Supersedeas Bond and Conditions of Appellate Stay. On April 2, 2021, Dixon's counsel informed the undersigned counsel for Respondent by email that Dixon had voluntarily vacated the subject property. Respondent's agents thereafter changed the locks and secured the property.

STANDARD OF REVIEW

The Court may affirm for any ground appearing in the record. Rule 220(c), SCACR; *see also Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 n. 2 (Ct. App. 2009)(citing *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)).

"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, 594 S.E.2d 478, 482 (2004); *see also Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 594, 748 S.E.2d 781, 786 (2013)("[I]n reviewing a decision with respect to Rule 60(b), this Court utilizes a deferential standard of review.").

This Court's "standard of review, therefore, is limited to determining whether there was an abuse of discretion." *Id.*

ARGUMENT

The Court must affirm Judge Maddox's Order Denying Defendant's Motion for Relief from Judgment/Order entered on August 31, 2020, for the following reasons:

I. Dixon's failure to appeal from Judge Maddox's denial of her Motion for Relief from Judgment/Order on the additional ground of futility requires the Court to affirm on that ground.

Dixon did not appeal from Judge Maddox's ruling that granting her relief from Judge Kirven's Orders would be futile. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

The final paragraph of Judge Maddox's Order Denying Defendant's Motion for Relief from Judgment/Order entered on August 31, 2020, denied Dixon's motion on the following additional ground:

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

(Order Denying Def.'s Mot. for Relief from J./Order p. 7.) Dixon has failed to address or argue against Judge Maddox's ruling on this additional ground of futility in her brief, and she is not permitted to address it for the first time in her Reply Brief. *State v. Wakefield*, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996)(holding that an issue raised for the first time in a "reply brief should not be considered on appeal because all issues must be argued in the initial briefs."). Therefore, the Court should affirm Judge Maddox's Order Denying Defendant's Motion for Relief from Judgment/Order on this additional ground.

II. Relieving Dixon from Judge Kirven's orders will make no difference to the outcome of the case because she abandoned her request for relief from Judge Drew's orders.

Relieving Dixon from Judge Kirven's Orders will make no difference to the outcome of the case because she abandoned her request for relief from the Judgment of Foreclosure and Sale and Supplemental Order Post Judgment entered by Judge Drew.

"Appellate courts recognize—or at least they should recognize—an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)(*citing Cox v. Cox*, 290 S.C. 245, 349 S.E.2d 92 (Ct. App. 1986)). "An error not shown to be prejudicial does not constitute grounds for

reversal." *Davis v. Davis,* 372 S.C. 64, 87, 641 S.E.2d 446, 458 (Ct. App. 2006)(internal quotations and citation omitted). "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." *Id.*

While Dixon's Motion for Relief from Judgment/Order originally requested relief from Judge Drew's two orders (Mot. for Relief from J./Order), her appeal now seeks relief only from Judge Kirven's Orders. An issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."); Rule 208(b)(1)(D), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

With Dixon having abandoned her request for relief from Judge Drew's orders, even a successful appeal at this point would leave this case in the same posture as existed when Judge Kirven took the bench: Dixon in default with her liability fully adjudicated, a Judgment of Foreclosure and Sale and a Supplemental Order Post Judgment already entered by Judge Drew, and the subject property ready to proceed to sale. A Report on Sale and Disbursements, Order Confirming Sale, Order of Deficiency Judgment, Writ of Assistance, and any supplemental orders necessary to update the judgment debt amount would all still eventually be entered against her, but just signed by a different judge.

Dixon does not bother arguing as to how a successful appeal would make any difference in the outcome of this case. She concedes that Judge Kirven displayed impartiality throughout this case. (Appellant's Br. p. 8 n. 1; Order p. 6.) She does not point to any particular errors of law or fact in the substance of Judge Kirven's Orders or argue that they would be any different if signed by a different judge. She does not dispute the amount of the judgment debt established

through Judge Kirven's supplemental orders, does not allege any irregularities or issues in the conduct of the foreclosure sale, and does not challenge the amount of the deficiency judgment.

For these reasons, vacating only Judge Kirven's Orders will make no difference in the outcome of this foreclosure action and this appeal has become an exercise in futility. The Court should therefore affirm Judge Maddox's Order Denying Defendant's Motion for Relief from Judgment/Order.

III. Dixon failed to make her Motion for Relief from Judgment/Order within a reasonable time.

Dixon failed to file her Motion for Relief from Judgment/Order within a reasonable time. A motion pursuant to Rule 60(b)(1), SCRCP, "shall be made within a reasonable time, and ... not more than one year after the judgment, order or proceeding was entered or taken." Rule 60(b), SCRCP. A motion pursuant to either Rule 60(b)(4) or Rule 60(b)(5), SCRCP, must also be filed within a "reasonable time." *McDaniel v. United States Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996)(discussing the time requirement for a motion under Rule 60(b)(4)); *Perry v. Heirs at Law & Distributees of Gadsden*, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003)(discussing the time requirement for a motion under Rule 60(b)(5)).

Dixon filed her Motion for Relief from Judgment/Order on January 10, 2019, which was:

- 2 years and 2 months after Judge Kirven's Second Supplemental Order Post Judgment;
- 1 year and 6 months after Judge Kirven's Third Supplemental Order Post Judgment;
- 1 year and 1 month after Judge Kirven's Fourth Supplemental Order Post Judgment;
- 8 months after Judge Kirven's Report on Sale and Disbursements and Order Confirming Sale and Order for Deficiency Judgment; and
- 7 months after Judge Kirven's Writ of Assistance.

Dixon's motion for relief under Rule 60(b)(1), SCRCP, from Judge Kirven's three supplemental orders is clearly time-barred since it was filed more than one year after entry of those orders.

Even though Dixon filed her motion within one year of the Report on Sale and Disbursements and Order Confirming Sale entered on May 7, 2018, the Order for Deficiency Judgment entered on May 7, 2018, and the Writ of Assistance entered on May 15, 2018, she still failed to file it within a "reasonable time" because she received notice no later than October 12, 2016, and on multiple occasions thereafter, that Judge Kirven had assumed the role of the presiding judge in this case. (Appellant's Br. p. 3; Notices of Suppl. Hr'gs.) Her motion should have been filed immediately after Judge Kirven's Second Supplemental Order Post Judgment and/or immediately after each successive order entered by Judge Kirven thereafter.

Instead, despite her knowledge that Judge Kirven had begun presiding over this case, Dixon sat back and waited for 2 years and 2 months, and for Judge Kirven to enter another five written orders, before filing her motion to complain about his involvement in this case.

Dixon's only explanation for her delay in seeking this relief is that she had "never appeared at any hearing before Judge Kirven" prior to the February 2019 hearing on her Motion for Relief from Judgment/Order. (Appellant's Br. p. 10.) In other words, Dixon seeks to use her own neglect in failing to attend the supplemental hearings as an excuse for her failure to act promptly in seeking relief from each of Judge Kirven's Orders. Dixon contends that "there was not a time when she appeared in court and saw Judge Kirven but remained silent" (Appellant's Br. p. 10). Yet there was a time no later than October 12, 2016, and on multiple occasions thereafter, when she received written notice that Judge Kirven had assumed the role of the presiding judge in this case "but remained silent." (Appellant's Br. p. 3; Notices of Suppl.

Hr'gs.) Therefore, Dixon's failure to appear at the supplemental hearings does not excuse her unreasonable delay in seeking relief from Judge Kirven's Orders.

For these reasons, Dixon's Motion for Relief from Judgment/Order was not made within a reasonable time, and the Court must affirm Judge Maddox's Order Denying Defendant's Motion for Relief from Judgment/Order.

IV. Judge Maddox did not abuse his discretion in denying Dixon's Motion for Relief from Judgment/Order under Rule 60(b)(4), SCRCP, because Cannon 3(E)(1)(b) did not mandate Judge Kirven's recusal and Dixon suffered no judicial prejudice.

Judge Maddox did not abuse his discretion in denying Dixon's motion under Rule 60(b)(4), SCRCP. "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons ... the judgment is void..." Rule 60(b)(4), SCRCP. "A void judgment is one that, from its inception, is a complete nullity and is without legal effect[.]" *Ware v. Ware*, 404 S.C. 1, 11, 743 S.E.2d 817, 822 (2013). "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Id.* "A judgment is not rendered void by irregularities which do not involve jurisdiction." *Id.*

Dixon does not dispute being properly served with process at the outset of this case, does not dispute receiving all hearing notices in this case, and does not dispute receiving notice of entry of all orders and judgments in this case. Dixon does not dispute the validity of the Order of Reference granting subject matter jurisdiction to the Master in Equity. Therefore, Judge Kirven had personal and subject matter jurisdiction at the time of entry of his orders in this case.

Dixon never filed a motion for recusal, but contends that Cannon 3(E)(1)(b) of the Code of Judicial Conduct mandated Judge Kirven's *sua sponte* recusal from this case immediately

upon taking the bench and that his failure to do so deprived him of jurisdiction to enter any orders.

"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..." Rule 3(E)(1)(b), CJC, Rule 501, SCACR.

Dixon's argument is flawed in two significant respects. First, Cannon 3(E)(1)(b) did not mandate Judge Kirven's recusal because he did not serve as lawyer in the matter "in controversy." His role as an attorney in this case prior to taking the bench was limited to the filing of a simple Answer on behalf of a junior lienholder defendant that took no position other than acknowledging the lien of his client's judgment against the subject property. (Ans. of AnMed Health; Ord. p. 9.) He did not appear at the final foreclosure hearing on November 23, 2015, or the first supplemental hearing on May 16, 2016. (Records of Hearing.) He served no role in litigating the matters actually in controversy in this mortgage foreclosure case—the debt owed by Dixon to Respondent and Dixon's default on that debt. *See United States Bank Tr. Nat'l Ass'n v. Bell*, 385 S.C. 364, 374-375, 684 S.E.2d 199, 205 (Ct. App. 2009)("[T]he party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt."). Therefore, Cannon 3(E)(1)(b) did not mandate his disqualification.

Second, Dixon's advocacy for a bright line rule of automatic disqualification under Cannon 3(E)(1)(b) loses sight of the fact that evidence of actual prejudice is required before this Court will reverse based on a judge's failure to disqualify himself. "Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *Davis v. Parkview Apartments*, 409 S.C. 266, 284, 762 S.E.2d 535, 545

(2014)(internal citations and quotations omitted)(analyzing a judge's duty to recuse under Cannon 3(E)(1) of the Code of Judicial Conduct). "Appellate courts accord great weight to the trial judge's assurance of his own impartiality." *Id.* "It is the movant's responsibility to provide some evidence of the existence of the judge's impartiality." *Id.*

Here, Dixon does not contend that Judge Kirven showed or acted with any partiality at any point in this case (App. Br. p. 8 n. 1; Order p. 6, 10) and has made no showing of any prejudice that she suffered as a result of his failure to immediately recuse himself. While Dixon complains that Judge Kirven's Orders "confirmed a judicial sale of Ms. Dixon's home ... which left her not only without a home, but with a deficiency judgment entered against her ..." (App. Br. p. 9), "[t]he fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings." *Mortg. Elec. Sys., Inc.*, 384 S.C. at 616, 682 S.E.2d at 503 (internal citations and quotations omitted). Further, Judge Kirven's Orders confirming the sale and setting the deficiency judgment amount were largely ministerial and procedural acts that simply carried out the relief required by Judge Drew's unappealed orders in this case.

The only South Carolina case law relied upon by Dixon to refute this "evidence of judicial prejudice" requirement is *Ledford v. Dep't of Pub. Safety*, 428 S.C. 387, 388, 835 S.E.2d 509, 509 (2019). However, her reliance on this case is misplaced.

Ledford concerned an appeal from the denial of a motion to recuse a Workers' Compensation Commissioner who "allegedly threatened criminal proceedings against [the petitioner] if the case was not settled; indicated that she engaged in her own investigation and made findings based on undisclosed materials outside the record; suggested [the petitioner] used 'creative accounting' in his tax returns; and questioned [the petitioner]'s credibility regarding his

claims of neck pain." *Id.* at 389, 835 S.E.2d at 510. The *Ledford* court's reversal of the Commissioner's failure to recuse herself was based on evidence of the actual conduct and behavior of the Commissioner that showed partiality, including her threatening the petitioner with criminal proceedings and giving a false affidavit. 428 S.C. at 392, 835 S.E.2d at 511 ("In our view, Commissioner Barden's behavior in this case would undoubtedly lead one to reasonably question her impartiality."). The Commissioner's conduct in *Ledford* did in fact prejudice the petitioner because it left him "with two equally undesirable options: (1) move forward with his claim and risk being referred for criminal prosecution; or (2) settle the case and forfeit his right to have his claim adjudicated..." 428 S.C. at 391, 835 S.E.2d at 511. Finally, the holding in *Ledford* was limited to "the discrete situation where a trial court judge (a workers' compensation commissioner) threatened criminal prosecution against a party if that party did not settle the case." 428 S.C. at 392-93, 835 S.E.2d at 512.

In summary, *Ledford* does not negate the "evidence of judicial prejudice" requirement for reversal on appeal and is not dispositive of the issue in this case. Rather, *Ledford* undermines Dixon's position because it demonstrates the type of extraordinary conduct and behavior of a judge that must occur before a judge's failure to recuse herself/himself will warrant reversal on appeal. 428 S.C. at 392-93, 835 S.E.2d at 511-12 (finding that the Commissioner's actual conduct and behavior was "unacceptable", "offensive to the ideals of a fair and impartial judiciary", "abusive", "strident", and "appalling".). Dixon has conceded that that Judge Kirven never showed or acted with any partiality at any point in this case.

For all of these reasons, Judge Kirven's Orders are not void for lack of jurisdiction, and Judge Maddox did not abuse his discretion in denying Dixon's Motion for Relief from Judgment/Order under Rule 60(b)(4), SCRCP.

V. Judge Maddox did not abuse his discretion in denying Dixon's Motion for Relief from Judgment/Order under Rule 60(b)(1), SCRCP, because Judge Kirven made no mistake in failing to recuse himself.

Judge Maddox did not abuse his discretion in denying Dixon's motion under Rule 60(b)(1), SCRCP. "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for ... mistake ..." Rule 60(b)(1), SCRCP.

Dixon contends that the "mistake" in this case was "Judge Kirven's continued participation ... [and] not disclosing and obtaining on-the-record consent from all parties, including Ms. Dixon, before presiding." (Appellant's Br. p. 11.)

However, a judge's mistake of law is not the proper focus of an inquiry under Rule 60(b)(1), SCRCP; rather, the proper focus of that inquiry is any mistake of fact. Rule 60(b)(1) "is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met." *Hillman v. Pinion*, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001)(internal citation omitted). "However, a party may not generally use Rule 60(b)(1) as a vehicle for relief from a mistake of law." *Id.* (internal citations omitted).

Even if Judge Kirven made a mistake in failing to *sua sponte* disqualify himself earlier in the case pursuant to Cannon 3(E)(1)(b) (which Respondent denies), that would be a mistake of law, not fact[1], and is not a valid ground for relief under Rule 60(b)(1), SCRCP.

But Judge Kirven made no mistake of law or fact in this case. Dixon failed to appear at

[1] "A mistake of fact is defined as an unconscious ignorance or forgetfulness of a material fact, past or present, or of a mistaken belief in the past or present existence of a material fact which did or does not actually exist...[a] mistake of law occurs where a person is well acquainted with the existence or nonexistence of facts, but is ignorant of, or comes to an erroneous conclusion as to, their legal effect." *Estate of Holden v. Holden*, 343 S.C. 267, 279, 539 S.E.2d 703, 710 (2000)(citing 27A Am. Jur. 2d Equity §§ 10, 25)(internal quotations omitted).

any of the hearings before Judge Kirven prior to the hearing on her Motion for Relief from Judgment/Order, leaving Judge Kirven with no way to the discuss the issue with her or obtain her consent. Further, as discussed *supra* in Section IV, Judge Kirven did not serve as a lawyer with respect to the matter "in controversy" in the foreclosure and there is no evidence of any judicial prejudice to Dixon resulting from Judge Kirven's failure to disqualify himself.

For these reasons, Judge Maddox did not abuse his discretion in determining that Judge Kirven made no "mistake" under Rule 60(b)(1), SCRCP, in failing to *sua sponte* disqualify himself from the case.

Aside from the lack of any "mistake," the following additional considerations required by the case law construing Rule 60(b)(1) support Judge Maddox's decision to deny Dixon relief from Judge Kirven's Orders: "(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party." *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (internal citations omitted).

a. Dixon did not act promptly in seeking relief from Judge Kirven's Orders and has no good reason for failing to do so.

As discussed *supra* in Section III above, Dixon's motion for relief under Rule 60(b)(1), SCRCP, from Judge Kirven's Order was not timely made and has no good reason for her failure to do so.

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

A meritorious defense is sufficient if it is "worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting doubtful evidence." *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989)(internal citations omitted). The preferred method of showing a

meritorious defense is the submission of a proposed answer, but this showing is not necessarily required. *Baker-Jennings Hardware Co. v. Culp*, 105 S.C. 418, 421, 90 S.E. 26, 27 (1916); *see also Owen v. Reed*, 288 S.C. 133, 136, 341 S.E.2d 629, 630 (1986).

Dixon failed to tender a proposed Answer to the foreclosure complaint with her motion or otherwise set forth any defenses she may have had to this foreclosure, and she has now abandoned her request for relief from Judge Drew's order of default against her in his Judgment for Foreclosure and Sale. Therefore, Dixon has no meritorious defense, and, even if she did, she is in default and can no longer plead that defense.

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

In determining whether to set aside a judgment, the Court must consider the prejudice to the opposing party if the judgment is set aside. *Rouvet*, 388 S.C. at 309, 696 S.E.2d at 208. Pursuant to the Judgment of Foreclosure and Sale, the subject property was sold on February 6, 2018, and that sale made final on March 8, 2018. Judge Maddox did not abuse his discretion in determining that granting Dixon's motion would prejudice Respondent financially if Respondent were required to incur the cost and expense of repeating the foreclosure process or some portion of it over (now) three years after the sale was completed.

VI. Dixon has abandoned the issue of whether it is inequitable for Judge Kirven's Orders to continue to stand by failing to support it with authority.

In Dixon's third issue on appeal, she argues that it is rare for a judge to not recuse himself in an action where he has previously appeared as counsel for a party, and argues in conclusory fashion that this warrants relief from judgment under Rule 60(b)(5), SCRCP, but then cites to no law in support of this argument. "An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory." *Bluffton Towne Ctr., LLC v. Gilleland-Prince*,

412 S.C. 554, 573, 772 S.E.2d 882, 892 (Ct. App. 2015). Therefore, Dixon's third issue on appeal is abandoned.

VII. Judge Maddox did not abuse his discretion in denying Dixon's Motion for Relief from Judgment/Order under Rule 60(b)(5), SCRCP, because Judge Kirven's Orders did not have prospective application and it would not be inequitable for Dixon to be bound by them.

Aside from Dixon's abandonment of this issue, Judge Maddox did not abuse his discretion in denying Dixon relief from Judge Kirven's Orders under the "no longer equitable" provision of Rule 60(b)(5), SCRCP.

The Court may relieve a party from a judgment or order where "it is no longer equitable that the judgment should have prospective application." Rule 60(b)(5), SCRCP. "Because our appellate courts have not definitively addressed Rule 60(b)(5), we have looked to the federal courts' interpretation as our rule is similar to the federal rule." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 594, 748 S.E.2d 781, 786 (2013). "Our research reveals that this rule has limited application and has rarely been applied." *Id.* (*citing* 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2863 (3d ed. Supp. 2012)).

All of the points previously discussed—the lack of any mistake in Judge Kirven's failure to *sua sponte* disqualify himself earlier in the case, the lack of any judicial prejudice to Dixon resulting from Judge Kirven's failure to *sua sponte* disqualify himself earlier in the case, the failure of Dixon to appear at any of the supplemental hearings, the untimeliness of Dixon's motion, the lack of any meritorious defense to the foreclosure, the prejudice that Respondent would incur—refute any argument that it would be inequitable for Dixon to be bound by all of Judge Kirven's Orders in this case.

Further, "[t]he test typically applied to determine whether an order has prospective application is whether it is executory or involves supervision of changing conduct or conditions

by the court." *Perry*, 357 S.C. at 49, 590 S.E.2d at 505-06 (internal quotations omitted)(denying motion for relief from partition order under Rule 60(b)(5))(*citing Saro Invs. v. Ocean Holiday P'ship*, 314 S.C. 116, 120, 441 S.E.2d 835, 838 n. 3 (Ct. App. 1994)). "For example, injunctions ordinarily have prospective application." *Id.* (internal citation omitted). "Partition orders, on the other hand, are executed orders because they mandate a one-time change in the ownership of property." *Id.*

Judge Kirven's Orders were ministerial supplements to Judge Drew's Judgment of Foreclosure and Sale, which, like the partition order at issue in *Perry,* collectively mandated a one-time change in the ownership of property and established a one-time judgment for the deficiency amount. They were not executory and did not involve supervision of changing conduct or conditions by the lower court. Therefore, Judge Kirven's Orders did not have prospective application and Rule 60(b)(5) is inapplicable to this case.

CONCLUSION

Based on the foregoing and any additional sustaining grounds appearing in the record, Respondent respectfully requests that the Court affirm Judge Maddox's Order Denying Defendant's Motion for Relief from Judgment/Order entered on August 31, 2020.

Respectfully submitted,

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July 30, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

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 the .....Appellant.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served a copy of the Initial Brief of the Respondent on July 30, 2021, by depositing a copy in the United States Mail, postage prepaid, addressed to the following parties/counsel of record:

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LICENSED IN SOUTH CAROLINA

ROGERS TOWNSEND
ATTORNEYS AT LAW

July 30, 2021

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court for the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: *Deutsche Bank National Trust Company, as Certificate trustee on behalf of Bosco Credit II Trust Series 2010-1 v. Doris J. Dixon; Anmed Health*
Appellate Case No. 2020-001253
Our File #: 510023.200

Dear Ms. Kitchings:

Enclosed are the original and four copies of the Initial Brief of the Respondent and a Designation of Matter to be Included in the Record of Appeal in reference to the above matter, along with a Proof of Service for each document.

By copy of this correspondence, I am serving copies of these documents on the Appellant.

At your convenience, please return a filed copy of these documents to me in the enclosed prepaid envelope.

Very truly yours,

Sean M. Foerster

/SMF
Enclosures

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