DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA ex rel. LAUREN KINGRY, Superintendent of the Arizona Department of Financial Institutions, as Receiver for LANDMARC CAPITAL & INVESTMENT COMPANY, Plaintiff/Appellee, TBM ASSOCIATES, LLC, Respondent/Appellee, OXFORD INVESTMENT PARTNERS, LLC, Respondent/Appellee, v. LANDMARC CAPITAL PARTNERS, LLC, Petitioner/Appellant.	1 CA-CV 11-0739 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2009-020595 and CV2009-050052 (Consolidated)

The Honorable Eileen S. Willett, Judge

REVERSED; REMANDED

Mariscal, Weeks, McIntyre & Friedlander, P.A. Phoenix
by Russell Piccoli
Attorneys for Defendant/Appellant

Ramras Law Offices, P.C. Phoenix
by David N. Ramras
Attorneys for Respondents/Appellees

T H O M P S O N, Judge

¶1 Landmarc Capital Partners, L.L.C. (Partners) appeals from the denial of its Arizona Rule of Civil Procedure 60(c)(4) motion to vacate a superior court order. For the reasons that follow, we reverse the superior court's denial of relief, and remand for further proceedings.[1]

BACKGROUND

I. The Westgate Loan

¶2 Landmarc Capital & Investment Co. (Landmarc) is an Arizona corporation and a licensed mortgage banker. In 2006, Landmarc formed Partners, an Arizona limited liability company, as a vehicle for making and acquiring secured real estate loans and participation interests in such loans.

¶3 In 2007, Landmarc brokered a $3.36 million loan to MSI Westgate L.L.C. (the Westgate Loan). This loan was secured by a deed of trust on commercial property located in Glendale (the Westgate Property). Landmarc sold participation and security interests in the Westgate Loan to: (1) TBM Associates, L.L.C. (TBM), (2) Partners, and (3) eight other investors placed with

[1] On the court's own motion, we amend the caption in this appeal to the one shown above. The amended caption shall be used on all future pleadings.

Landmarc by Oxford Investors. The latter group included: PK Holdings, L.L.C.; the Rhonda Kaye Solheim Family Trust; Spruce Avenue Limited Partnership, L.L.P.; the S. Brotzman S. Vanbladel Revocable Trust; John Buchheit (succeeded by OxTox Holdings, L.L.C.); Robert Buchheit; the 1977 Gill Family Trust; and Stephen L. Hooker, IRA (collectively the Oxford Investors).

¶4 Jeffrey Peterson (Peterson), Landmarc's vice president, agreed in writing on January 29, 2008, that the Oxford Investors would be paid first in the event of default. The claimed authority for Peterson's grant of this "first out right" is a January 1, 2008 corporate resolution authorizing Peterson to enter contracts on Landmarc's behalf.

¶5 Following default, Landmarc foreclosed on the Westgate Property and took title via a trustee's deed on or about October 9, 2008. Landmarc subsequently recorded a corrective trustee's deed on December 31, 2008 to address a legal description error in the prior trustee's deed.

¶6 On December 31, 2008, Landmarc conveyed legal title to the Westgate Property via warranty deed to LCI-Westgate, L.L.C. (LCI-Westgate), an entity allegedly created with the consent of investors in the Westgate Property. At that point, LCI-Westgate had one member, Landmarc, and no operating agreement.

II. The Receivership

¶7 The superior court initially appointed a receiver (the Receiver)[2] for Landmarc on June 24, 2009. In a subsequent order, the court authorized the Receiver to "[a]ssume full control of Landmarc"; "[c]ollect, receive and take exclusive custody, control and possession of all assets, bank accounts, securities, business accounts, goods, chattels, causes of action, credits, monies, affects, books and records of account and other papers and property or interests owned beneficially or otherwise by Landmarc, or held by Landmarc, as trustee or in any other capacity . . . "; "[e]nter into contracts"; and "conduct the business operations of Landmarc and the entities it controls . . . ."

¶8 In July 2009, the Receiver broached the idea of converting TBM's loan interests into membership interests in LCI-Westgate and creating a formal operating agreement. The eventual result was the LCI-Westgate Operating Agreement, executed on April 10, 2010, that identified TBM, Landmarc, Partners, and the Oxford Investors as members. The deputy receiver's counsel executed the LCI-Westgate Operating Agreement on behalf of Partners.

[2] The Receiver is the State of Arizona ex rel. Lauren Kingry, Superintendent of the Arizona Department of Financial Institutions.

¶9 In November 2010, the Receiver notified Partners's members of its upcoming resignation as Partners's manager, effective December 31, 2010. Partners's investors accordingly held a meeting and elected the following managers on December 3, 2010: Steve Casselman (Casselman), Harvey Friedman, Robert Hicklin, Jr., Jack Rubin, and Steve Scheiner (collectively the Managers).

III. Petition 41

¶10 Meanwhile, the Receiver continued to conduct business on behalf of Landmarc. LCI-Westgate and Landmarc had previously opened an escrow with Fidelity National Title Insurance (Fidelity) to facilitate the Westgate Property's transfer to LCI-Westgate. Fidelity, however, took the position that escrow never closed, and filed two "Affidavits of Erroneous Recording."

¶11 The Receiver accordingly filed Petition 41 on January 11, 2011, requesting an order (1) ratifying the transfer to LCI-Westgate of funds relating to Westgate, and (2) invalidating the two affidavits of erroneous recording. Petition 41 also stated that "the parties reached an agreement to modify the structure of the management of LCI-Westgate, and negotiated and entered into a new operating agreement for the company" and requested approval of that operating agreement. A copy of the operating agreement was not attached to the petition; nor was its substance set out in the petition. The superior court held a

hearing and, having received no objections, entered the requested order on January 21, 2011.

¶12 On July 20, 2011, Partners filed a Rule 60(c)(4) motion to vacate the order granting Petition 41. Partners claimed that it was denied due process because it received no prior notice concerning the contents of the LCI-Westgate Operating Agreement.

¶13 After briefing by several Oxford Investors (Respondents),[3] Partners, the Receiver, and TBM, the superior court denied Partners's motion in an unsigned order without oral argument. Partners filed a notice of appeal from this order on October 11, 2011, then obtained a signed order with Rule 54(b) language.

DISCUSSION

I. Standard of Review

¶14 Partners moved for relief under Rule 60(c)(4) based upon lack of notice. This court reviews de novo the denial of a Rule 60(c)(4) motion to vacate judgment on the ground it is void. *Ezell v. Quon*, 224 Ariz. 532, 536, ¶ 15, 233 P.3d 645, 649 (App. 2010).

[3] The Respondents are PK Holdings L.L.C., the Rhonda Kaye Solheim Family Trust U.S.A., Spruce Avenue Ltd. Partnership, OxTox Holdings, and the 1977 Gill Trust U/A.

II. The Superior Court Erroneously Found That, As A Matter Of Law, Partners Had Received Notice.

¶15 A judgment is void under Rule 60(c)(4) when the superior court lacks subject matter jurisdiction, personal jurisdiction, or jurisdiction to render the particular judgment or order entered. *Cockerham v. Zikratch*, 127 Ariz. 230, 234-35, 619 P.2d 739, 743-44 (1980). An order is also void if it is "premised . . . on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1377 (2010) (analyzing the parallel federal rule, Federal Rule of Civil Procedure 60(b)(4)); *see generally In re Villar*, 317 B.R. 88, 94 (B.A.P. 9th Cir. 2004) ("an order granted without adequate notice does not satisfy the requirements of due process of law and is therefore inevitably void"); 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 2862, at 331 (2d ed. 1995 & Supp. 2012) (stating that a judgment is void if the court "acted in a manner inconsistent with due process of law").

¶16 Partners does not allege that the court lacked jurisdiction to act; rather, it contends that its due process rights were violated when it did not receive a copy of the LCI-Westgate Operating Agreement or other notice of the "first out right" prior to the hearing on Petition 41. Whether a party has

received constitutional due process is determined by analysis of all applicable circumstances:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) (citations omitted); *see Foster v. Ames*, 5 Ariz. App. 1, 3-4, 422 P.2d 731, 733-34 (1967) (holding that interested parties are entitled to notice of proceedings in a receivership in order to afford them an opportunity to object).

¶17 In *Espinosa*, the United States Supreme Court analyzed the parallel federal rule, Federal Rule 60(b)(4), as a potential basis for challenging an order as void. 130 S. Ct. at 1377. The Court ultimately rejected the creditor's argument that a confirmation order was void due to lack of notice, notwithstanding a violation of Rule 7004(b)(3) of the Federal Rules of Bankruptcy Procedure, because the creditor had received actual notice of the discharge plan. *Id.* at 1376-78. Respondents contend that Partners likewise received actual

notice of the Operating Agreement because the Receiver, in its capacity as manager of Partners — in Landmarc's stead — had received notice of the Operating Agreement's terms at the time of execution in 2010.

¶18 Partners, however, contends that *Espinosa* is distinguishable. That case concerned a lender who received actual notice of a bankruptcy filing and the plan's contents. *Id.* at 1374, 1378. Here, Respondents seek to impute notice to Partners based upon an earlier notification to the Receiver. Partners argues that the Receiver is not an agent for any given party, and is charged by the court with acting for the benefit of all parties. Consequently, Partners contends, the Receiver could not be an agent for purposes of imputing notice to Partners of a hearing on a proposed contract that disadvantages Partners and advantages other creditors.

¶19 We agree that the Receiver is the agent only of the appointing court, and not of any particular party. *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147, 150 (4th Cir. 1944); *City of Santa Monica v. Gonzalez*, 182 P.3d 1027, 1043 (Cal. 2008). The Receiver also has a duty to "not only consider the rights of the claimants as between them and the corporation, but their respective rights as between themselves." *Sisk v. White*, 50 Ariz. 103, 106, 69 P.2d 242, 244 (1937). Thus, the Receiver had an obligation not only to notify the Oxford Investors, but

also Partners, of the LCI-Westgate Operating Agreement's terms. Under the circumstances, we cannot agree that notice to the Receiver, who Partners argues breached a duty to Partners, constituted notice to Partners as a matter of law.

¶20 Nothing in Petition 41 or prior court filings actually notified Partners of the treatment of Respondents in the LCI-Westgate Operating Agreement and Partners's basis for an objection. Nor can we agree that Partners should have surmised the import of the LCI-Westgate Operating Agreement based upon provisions in other documents. Without knowledge of the LCI-Westgate Operating Agreement's terms, Partners could not formulate an objection to it. *See In re Loloee*, 241 B.R. 655, 660-62 (B.A.P. 9th Cir. 1999) (holding that notice of pending sale gave no indication of an intent to pre-empt lien priority disputes); *see generally Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-14 (1978) (holding that a utility committed a due process violation by notifying customers only of the impending disconnection date without alerting them to a procedure for challenging disputed bills); *In re Marcus Hook Dev. Park, Inc.*, 143 B.R. 648, 660 (Bankr. W.D. Pa. 1992) (due process requires that the interested party "be reasonably apprised that the contemplated action is directed against *its* interest").

III. The Superior Court Shall Resolve The Parties' Factual Disputes On Remand.

¶21 The Respondents counter that if Partners lacked notice, it was of no practical consequence because the "first out right" affirmed in the LCI-Westgate Agreement had been in effect since 2008, and in any case, the parties are bound by the preferential treatment to which Peterson had agreed. These are factual issues unsuited for resolution as a matter of law on appeal. On remand, the superior court shall reset Petition 41 for hearing.

CONCLUSION

¶22 We reverse the superior court's denial of the motion to vacate pursuant to Rule 60(c)(4) and direct the court to grant the motion to vacate and set the petition for hearing. In addition, we deny Respondents' request for attorneys' fees pursuant to A.R.S. § 12-341.01(A) (2003).

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
DIANE M. JOHNSEN, Judge