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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Cynthia Graham Howe, Master-in-Equity
Ralph P. Stroman, Special Referee

Unpublished Opinion No. 2022-UP-146 (S.C. Ct. App. filed March 23, 2022)

Leticia, LLC, Movant,

In Re:

M&T Bank, Plaintiff,

v.

Tyrone Davis; Bobby J. Bellamy; BC Fund and Management LLC d/b/a BC Fund, LLC,
..... Defendants.

And

M&T Bank, Respondent,

v.

Tyrone Davis, Bobby J. Bellamy, BC Fund and Management, LLC d/b/a BC Fund, LLC,
..... Defendants,

Of whom Bobby J. Bellamy is the Appellant,

And

Tyrone Davis is the Respondent.

And

Bobby J. Bellamy, Appellant,

v.

William O. Smith, Third Party Defendant.

RESPONDENT M&T BANK'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Petitioner identify questions for review that were not included in his Petition for Rehearing filed with the Court of Appeals?
2. Are there special and important reasons to review the Court of Appeals' decision?
3. Has the Petitioner complied with the Appellate Court Rules related to the filing of a Petition for a Writ of Certiorari to the Court of Appeals?

STATEMENT OF THE CASE

The underlying action is for the reformation and foreclosure of a mortgage. The loan on which Respondent M&T Bank ("M&T Bank") filed this action was made to the Respondent Tyrone Davis ("Davis"). M&T Bank joined BC Fund and Management, LLC, doing business as BC Fund, LLC ("BC Fund") and Petitioner, Bobby Bellamy ("Petitioner") as parties to the action to reform mistakes made in the deeds that are in the chain of title to the mortgaged property ("Property"). Bobby Bellamy conveyed title to the Property to BC Fund, who in turn transferred title to Davis, whereupon Davis mortgaged the Property.

There were two mistakes in the deed from Bellamy to BC Fund and the deed from BC Fund to Davis. The first mistake concerned an incorrectly stated property boundary. The second related to the identification of BC Fund in the deeds as "BC Fund, LLC," not "BC Fund and Management, LLC," the name in which the entity was organized. M&T Bank argued that these were unintended mistakes that could be corrected through reformation. Petitioner contended the second mistake was fatal and failed to transfer title from Petitioner. Petitioner advanced his position through a series of affirmative defenses, counterclaims and a third-party complaint.

The lower court entered its Master's Order of Judgment and Foreclosure Sale on May 4, 2018 ("Foreclosure Order"). In the Foreclosure Order, the lower court determined that the deeds

and mortgage should be reformed as requested by M&T Bank, granted M&T Bank's foreclosure, and found against Petitioner on his affirmative defenses, counterclaims and cross complaint. Petitioner appealed the Foreclosure Order (Appellate Case Number 2018-001523) ("First Appeal").

Petitioner did not take the steps necessary to stay the sale ordered in the Foreclosure Order and the lower court sold the foreclosed property at a foreclosure sale on September 4, 2018 to Coastal Resort Properties, LLC ("Coastal"). The Notice of Sale for the foreclosure sale indicated that Respondent waived its right to a deficiency judgment and the lower court published the Notice of Sale indicating the deficiency waiver. The foreclosure sale purchaser delayed compliance with the foreclosure bid pending a resolution of the First Appeal.

Petitioner failed to order the transcript of the trial in the lower court and, following several unheeded admonishments by the Court of Appeals to the Petitioner directing him to order the transcript, the Court of Appeals dismissed the First Appeal on June 27, 2019. On July 15, 2019 the Court of Appeals issued a Remittitur remitting the matter to the lower court.

On August 1, 2019 the Petitioner filed his Motion to Recall Remitter (sic) with the Court of Appeals that was denied by Order Denying Motion entered on September 17, 2019.

Coastal assigned its foreclosure sale bid to Leticia, LLC ("Leticia") by Assignment of Bid recorded September 3, 2019. On September 3, 2019 the lower court entered its Master in Equity's Report on Sale and Disbursements ("Report"), reporting that Leticia complied with the bid, and the lower court issued a deed to the foreclosed property to Leticia.

On September 9, 2019, the lower court granted Leticia's motion seeking a Writ of Assistance ("Writ of Assistance"), placing Leticia in possession of the foreclosed property.

On October 8, 2019, the Appellant filed a Notice of Appeal as to the Report and the Writ of Assistance (Appellate Case No. 2019-001682) (“Second Appeal”). On October 17, 2019 the Petitioner filed his Amended Notice of Appeal. The Proof of Service filed by Petitioner indicates that he served the Notice of Appeal on Leticia by serving John M. Kelchner (“Kelchner”), its attorney, and W. Cliff Moore, III (“Moore”), its attorney. Neither Kelchner nor Moore is Leticia’s attorney.

On December 16, 2019, M&T Bank filed a Motion to Dismiss, arguing that the Second Appeal should be dismissed because Petitioner: (1) did not timely file his Initial Brief, (2) failed to serve Leticia, and (3) failed to serve anyone with a letter ordering transcripts from the lower court.

The Court of Appeals summarily denied M&T Bank’s Motion to Dismiss by order dated February 28, 2020. M&T Bank’s Brief in the Second Appeal included a challenge to the appeal based on the fact that Petitioner did not serve Leticia with the Notice of Appeal. Petitioner filed a Reply Brief that addressed the argument raised by M&T Bank as to the consequences of the failure to serve the Notice of Appeal on Leticia. After the parties fully briefed Petitioner’s appeal of the Report and the Writ of Assistance, the Court of Appeals issued its decision affirming the Report and the Writ of Assistance on March 23, 2022 (Unpublished Opinion No. 2022-UP-146). The Court of Appeals’ decision was based on Petitioner’s failure to serve Leticia.

On April 1, 2022, Petitioner filed a Motion for Rehearing of the Second Appeal. In that Motion, Petitioner requested that the Court of Appeals reconsider its decision based on the Petitioner’s confusion related to the identity of the successful bidder at foreclosure sale,¹

¹ Petitioner identifies a third entity, Rowe Ventures, LLC (“Rowe”), as the successful bidder at foreclosure sale to further explain his confusion. He offers that Rowe can be identified as the successful foreclosure sale purchaser by attaching a copy of a form from the Horry County Sheriff’s Office dated October 22, 2019 containing information on the Property seizure pursuant to the Writ of Assistance. A representative of Rowe signed the form stating that it

Petitioner's efforts to serve Leticia, alleged irregularities in the foreclosure sale process, and the Court of Appeals' Order denying the Motion to Dismiss.

The Court of Appeals denied the Petition for Rehearing by Order filed April 21, 2022.

Petitioner filed a Petition for Writ of Certiorari on May 18, 2022 and an Amended Petition for Writ of Certiorari on May 27, 2022. The Petitioner failed to file proof of service of the Petition for Writ of Certiorari or the Amended Petition for Writ of Certiorari on Leticia, BC Fund, or William O. Smith.

ARGUMENTS

1. Petitioner identifies questions for review that are precluded because they were not included in his Petition for Rehearing.

Rule 242(d)(2), SCACR, provides that “[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Of the nine (9) questions identified by Petitioner, five (5) were not addressed in Petitioner's Petition for Rehearing to the Court of Appeals.

Question 3 in the Petition asks if the Court of Appeals erred in dismissing Attorney Scott Umstead. This point was not raised in the Petition for Rehearing. Furthermore, the issue has no bearing on Petitioner's appeal of the Report or the Writ of Assistance. Instead, the Petitioner is trying, inappropriately, to raise issues resolved in the First Appeal. Mr. Umstead is an attorney licensed to practice law in the State of South Carolina and closed one of the real estate transactions at issue in this matter. Mr. Umstead was a witness at the trial before the lower court. Mr. Umstead was never a party to this litigation. The Court of Appeals did not dismiss Mr. Umstead from this matter.

received the Property as agent of the successful bidder. This document is not part of the Record on Appeal, and Petitioner first presented it with his Motion to Reconsider.

In Question 6 identified in the Petition, Petitioner attempts to challenge the portion of the Foreclosure Order that reformed the deeds and the mortgage by arguing that the decision by the lower court was wrong and therefore precluded the lower court from conveying title to the purchaser at the foreclosure sale. Not only was that issue also resolved in the First Appeal, it does not appear in the Petition for Rehearing.

Petitioner attempts to challenge the lower court's decision dismissing his counterclaim for civil conspiracy in Question 7 of the Petition. Not only is this issue both unpreserved and an attempt to inappropriately raise a matter resolved with the First Appeal, Petitioner actually consented to the order dismissing the counterclaim. At the time the counterclaim was dismissed, Howell V. Bellamy, III, represented Petitioner and he signed his consent to the order that dismissed the counterclaim.

Question 8 in the Petition questions the standard of proof used by the lower court in its decision on the reformation request. Petitioner argues that this error precluded the Master in Equity from delivering a deed to the foreclosed property. Again, this issue was not raised in the Motion for Rehearing to the Court of Appeals and is an attempt to raise an issue finally resolved in the First Appeal.

Finally, in Question 9 of the Petition, Petitioner questions the lower court's decision that allowed M&T Bank to amend its Complaint to allege that BC Fund and Management, LLC did business as BC Fund, LLC. This issue was also finally decided in the First Appeal and was not addressed in the Motion for Rehearing.

Rule 242, SCACR, is clear as to what can be presented to the Supreme Court in a petition for a writ of certiorari to the Court of Appeals. Questions 3, 6, 7, 8 and 9 cannot be raised because of that rule and should not be raised because they have been finally decided in a previous appeal.

2. There are not special or important reasons to review the decision of the Court of Appeals.

The four (4) questions presented by the Petitioner that remain following the scrutiny under Rule 242(d)(2), SCACR, concern three questions: (a) was Leticia a Respondent that the Petitioner was required to serve with the Notice of Appeal, (b) did the Court of Appeals' denial of Respondent's Motion to Dismiss finally decide the issue of required service of the Notice of Appeal on Leticia; and (c) did the lower court fail to follow the correct foreclosure sale procedures? Arguably, the decision of which Petitioner requests review addresses the first two of those remaining questions; but it does not rule on the propriety of the foreclosure sale process in the lower court. As such, only the questions addressing Leticia's status as a Respondent and the res judicata effect of the Order on the Motion to Dismiss should be considered by this Court in making a decision as to whether to grant certiorari.

Rule 242(b), SCACR provides a nonexclusive list of considerations that the Supreme Court should review in making a decision on a petition for a writ of certiorari. As discussed below, the Petition for Certiorari does not identify any of the considerations set out in Rule 242(b), SCACR and offers no other special or important reason for review.

(a) Leticia is a Respondent in this appeal.

The manner in which the Respondent framed this appeal directs that Leticia should be a respondent. Rule 202(a), SCACR, designates any parties adverse to the appellant as a respondent. Petitioner's appeal of the Report challenges the validity of the Deed issued by the lower court to Leticia. The Writ of Assistance under appeal identifies Leticia as the "Movant" – the party that requested the Writ. By challenging the validity of the deed to Leticia set out in the Report and

the relief given to Leticia through the Writ of Assistance, Petitioner made Leticia an adverse party and, consequently, a respondent.

Petitioner unnecessarily confuses the matter related to Leticia's role in this appeal by suggesting that Coastal, Leticia, and Rowe are all identified as successful bidders. The facts are clear. Coastal was the successful bidder at the foreclosure sale and assigned its bid to Leticia. The lower court issued a deed to Leticia, and Leticia made application for a Writ of Assistance. The sheriff placed Leticia in possession of the Property pursuant to the Writ by delivery to Rowe, Leticia's agent. There is no confusion, and Petitioner's attempt to create confusion where none exists is not a special or important reason for this Court to review the Court of Appeals' decision.

Rule 203(b)(1), SCACR, requires that Appellant serve the Notice of Appeal on each Respondent. The requirement that Appellant timely serve all Respondents with the Notice of Appeal is jurisdictional, and failure to serve a Respondent is fatal to the life of the appeal. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). Petitioner does not offer any authority for his attempt to characterize Leticia as a "movant" not entitled to be served with the Notice of Appeal. There is none. Leticia had a substantial interest in the Report and the Writ of Assistance and was entitled to notice of the appeal of either.

(b) The Order denying M&T Bank's Motion to Dismiss does not have res judicata effect on the question of the Petitioner's obligation to serve Leticia with a copy of the Notice of Appeal.

To establish *res judicata* as to a particular issue, Petitioner must demonstrate that there has been a final adjudication of the issue in a former lawsuit. *Plum Creek Development Co., Inc. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999). Therefore, the Petitioner's claim of res

judicata is not appropriate because the decision he offers as decisive of the issue was made in the same case that he asserts the bar.

Perhaps Petitioner attempts to articulate an argument that the Order on the Motion to Dismiss established the law of the case. “The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right.” *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013), quoting *Weil v. Weil*, 229 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). A denial of a motion to dismiss does not establish the law of the case. *McLendon v. South Carolina Dept. of Highways and Public Transp.*, 313 S.C. 525, 443 S.E.2d 539 (1994). See also, *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 390 (1994) (“the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings.”).

Following the issuance of the Order denying M&T Bank’s Motion to Dismiss, M&T Bank briefed its argument concerning Petitioner’s failure to serve Leticia with the Notice of Appeal and Petitioner responded to that argument in his Reply Brief. The issue was not finally resolved until the Court of Appeals entered the Unpublished Opinion on March 23, 2022.

(c) The questions concerning the foreclosure process were not addressed in the Opinion of which Petitioner requests review, and the statutes offered by Petitioner are not applicable to this matter.

Questions 4 and 5 in the Petition concern the foreclosure process in the lower court. The facts and issues relevant to each of these questions was not addressed in the Unpublished Opinion of which the Petitioner requests review. As such, the questions are not appropriate. Regardless,

neither question addresses special or important reasons to review the Court of Appeals' decision. In fact, both involve a misunderstanding of applicable law.

In his development of the issues raised by his Question 4, Petitioner invokes statutes relating to judicial sales pursuant to executions on judgments and tax executions. S.C. Code Ann. §§ 15-39-40, 15-39-830, 15-39-840, and 15-39-860 (2005 & Supp. 2021). The matter proposed for review did not involve a judicial sale of real property on execution. It concerns the sale of real property pursuant to a foreclosure action that is allowed by a different set of statutes. See, e.g., S.C. Code Ann. § 29-3-610 (2007 & Supp. 2021), *et seq.* and Rule 71, SCRCPP.

Through Question 5, Petitioner suggests that the lower court did not conduct the foreclosure sale as required by statute. Specifically, Petitioner points to S.C. Code Ann. § 15-39-720 (Supp. 2021) and assigns error to the process because the lower court did not hold bidding open for thirty (30) days after the date of sale for the purpose of receiving upset bids. Petitioner also challenges the judicial foreclosure sale because he believes the lower court failed to allow petitions for appraisals pursuant to S.C. Code Ann. § 29-3-680 (2007).

The provisions of S.C. Code Ann. § 15-39-720 (Supp. 2021) do not apply to judicial mortgage foreclosure sales if the owner of the mortgage does not seek a personal or deficiency judgment, and the advertisement of sale states that no deficiency or personal judgment is demanded and that the sale will be final. S.C. Code Ann. § 15-39-760 (2005). In this matter, M&T Bank did not seek a deficiency judgment against its borrower, Davis. It waived the right to pursue that deficiency by filing the Waiver of Deficiency on May 7, 2018. The lower court sold the foreclosed property pursuant to a published Notice of Sale which clearly indicated that no deficiency or personal judgment was demanded and that bidding at the foreclosure sale would be final and not remain open for 30 days following the opening of the sale.

Petitioner's invocation of S.C. Code Ann. § 29-3-680 (2007) is also misplaced. The appraisal process, of which § 29-3-680 (2007) is a part, allows defendants in mortgage foreclosure proceedings against whom a personal or deficiency judgment has been requested to determine the amount of that personal or deficiency judgment based on the fair market value of the property in lieu of being determined based on the foreclosure sale proceeds. *See generally* S.C. Code Ann. §§ 29-3-660 to 770 (2007 & Supp. 2021). Applications for an Order of Appraisal are only available to defendants in foreclosure proceedings against whom a personal or deficiency judgment has been requested. S.C. Code Ann. § 29-3-680(A) (2007). Petitioner was not an obligor on the debt foreclosed by M&T Bank, and M&T Bank never requested judgment against Petitioner for the debt. Further, M&T Bank waived deficiency as to any party. Therefore, the appraisal process and § 29-3-680 (2007) do not apply to this foreclosure action.

The lower court conducted the judicial foreclosure sale as required by statute. The procedures that Petitioner suggests should have been invoked are not applicable to the foreclosure sale at issue in this appeal.

3. The Petition for Writ of Certiorari should be dismissed because Petitioner failed to comply with the requirements of Appellate Court Rules.

Rule 240(d) and 262(b), SCACR, require the Petitioner to serve a copy of the Petition for Writ of Certiorari upon each party. Petitioner filed Proofs of Service indicating that he served M&T Bank and Davis. He has not offered any proof of service on Leticia, BC Fund, or William O. Smith.

Failure to comply with Appellate Court Rules warrants an order of dismissal. Rule 260(a), SCACR.

CONCLUSION

The Petitioner has not offered any special or important reason to review the Opinion of the Court of Appeals. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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