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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to the Court of Appeals
APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough
Master-in-Equity

Court of Appeals Opinion No. 2022-UP-308
Supreme Court Case No. 2022-001651

Ditech Financial, LLC .....Respondent,

v.

Kevin G. Snyder, individually and as Personal Representative of the Estate of Mary Snyder.....Petitioner.

REPLY OF PETITIONER

Jason Scott Luck
P.O. Box 47
Bennettsville, SC 29512
843.479.6863
jason@luck.law
Attorney for Petitioner

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ARGUMENT IN REPLY

No argument of Ditech's Return changes the fact that the Master-in-Equity lacked adjudicative authority after the service of Snyder's March 29, 2019, notice of appeal. This fact renders the Master-in-Equity's April 23, 2019, Order and Judgment of Foreclosure and Sale void; it is a nullity the Court of Appeals cannot affirm. Further, the Master-in-Equity's March 27, 2019, Order on Motions for Summary Judgment was premature, as sufficient evidence existed in the record to submit this matter to the trier of fact. The Master-in-Equity's April 23, 2019, order should be voided, his March 27, 2019, order reversed, and this case should be remanded for further proceedings.

I. If Ditech is Correct about Subject Matter Jurisdiction, the Master-in-Equity had no Adjudicative Authority and his Acts were Void.

Assuming, *arguendo*, Ditech is correct that the "power to address a particular issue" described the Opinion (R 833-834) is not subject matter jurisdiction, then this "power to address a particular issue" is certainly the third type of jurisdiction described by this Court in *Limehouse v. Hulsey*:

> Jurisdiction is generally defined as "the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause." 32A Am.Jur.2d *Federal Courts* § 581 (2007) (footnotes omitted). Specifically, "[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and **(3) the court's power to render the particular judgment requested.**" *Indep. Sch. Dist. No. 1 of Okla. County v. Scott*, 15 P.3d 1244, 1248 (Okla.Civ. App.2000).

404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (emphasis added). In *Limehouse*, the removal of an action to the Federal District Court suspended the state court's power

to render a judgment, despite the state court having personal and subject matter jurisdiction. The state court conducted proceedings after the District Court ordered remand, but before the state court received a certified copy of the remand order, which was the time specified by statute that the state court resumed jurisdiction. This Court declared void all state court proceedings that occurred prior to the receipt of a certified remand order. *Id.*, 404 S.C. at 109. This Court then remanded the case to the state court to recommence from the procedural point at which the clerk received a certified copy of the remand order. *Id.*, 404 S.C. at 110. If this Court agrees with the Ditech's assessment of subject matter jurisdiction, then it must, under *Limehouse*, void all judicial acts subsequent to the March 29, 2019, notice of appeal (including the April 23, 2019, Order and Judgment of Foreclosure and Sale) and remand[1] this case to the Master-in-Equity for a new hearing.[2]

II. If the Master-in-Equity's April 23, 2019, order and judgment is not void, then it is subject to setoff.

If the Master-in-Equity's acts subsequent to the March 29, 2019, notice of appeal are void, then Snyder's Attorney Preference Statute defense is moot, as there

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[1] A void order "'is, in legal effect, nothing.'" *Innovative Waste Mgmt. v. Crest Energy Partners*, 423 S.C. 611, 615, 815 S.E.2d 780, 782 (Ct. App. 2018) (quoting *Turner v. Malone*, 24 S.C. 398, 401 (1886)) *affirmed as modified* 425 S.C. 568, 824 S.E.2d 214 (2019). Therefore, the April 23, 2019, order never existed – there is nothing for the Court of Appeals to affirm. The only relief possible under Rule 220(a), SCACR, is remand.

[2] Application of *Limehouse* moots Ditech's structural error arguments. (Ret. pp. 14-16). However, the uncertainty the Ditech notes in its structural error argument supports the grant of certiorari. *See* Rule 242(b)(3), (4), & (5), SCACR; *see also City & Cty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1774 (2015) ("certiorari jurisdiction exists to clarify the law.").

is no judgment for a setoff. If the Master-in-Equity's April 23, 2019, order is still valid, then paragraph 9 of that order (R 30) can provide for the application of the statutory penalty and/or any actual damages from violation of the Attorney Preference Statute. These charges could have easily been included in the November 10, 2021, Order of Sale and Disbursement. (R 950).

III. Ditech does not address Snyder's showing of a Scintilla of Evidence.

A court reviewing an order granting a motion for summary judgment utilizes the same standard of review as the trial court:

> In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.

S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 517, 548 S.E.2d 880, 883 (Ct. App. 2001) (citations removed). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. *Mosteller v. Cty. of Lexington*, 336 S.C. 360, 362, 520 S.E.2d 620, 621 (1999).

Instead of addressing the scintilla of evidence Snyder identified in the Petition, Ditech presents this Court with its version of the facts. Ditech's narrative does not present the facts in a light most favorable to the non-moving party, and thus should not be considered.[3]

[3] For example, Ditech downplays the significance of the Affidavit of Default filed on August 26, 2013, and which Ditech refused to address until roughly six years later.

IV. Mary Snyder was a "Borrower" under the Attorney Preference Statute.

Ditech, through a footnote, argues the late Mary Snyder was not a "borrower" under the Attorney Preference Statute, an issue the Court of Appeals declined to address. (Ret. p. 18; R 832). To the extent this issue is even properly before this Court, the Attorney Preference Statute supports Snyder's interpretation:

> The creditor must ascertain prior to closing the preference of the **borrower** as to the legal counsel that is employed to represent the **debtor** in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10, et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

S.C. Code § 37-10-102(a) (emphasis added). The words "borrower" and "debtor" are used in the same statute; if the legislature intended for "borrower" to be equivalent to "debtor", it would have used the word "debtor". Accordingly, "borrower" must have a different meaning under this statute. It is reasonable to include non-debtor signatories to the mortgage (*i.e.*, Mary Snyder) in the definition of "borrower", as that person's ownership interest will be encumbered by the debtor's transaction, as has occurred in this case.

(Pet. p. 17; Ret. p. 21; R 17, 84). Ditech also downplays the fact that it never preserved certain documents, despite its legal predecessor being warned these documents must be preserved. (Pet. p. 18; Ret. p. 22; R 99-101, 164).

V. Snyder has a Right to Pursue an Action for Civil Compensatory Contempt under this Court's Administrative Order 2011-05-02-01.

Ditech, through a footnote, argues the Admin Order does not create a private right of action, an issue the Court of Appeals declined to address. (Ret. p. 22; R 829). To the extent this issue is even properly before this Court, Snyder did not assert a new private cause of action like the plaintiffs in *Weber v. Bank of Am., N.A.*, 2013 WL 4820446 (D.S.C. Sept 10, 2013). In this case, Snyder used existing, well-settled case law that provides for a cause of action for civil compensatory contempt to enforce the terms of the Admin Order.[4] *Jarrell v. Petoseed Co., Inc.*, 331 S.C. 207, 500 S.E.2d 793 (Ct. App. 1998). Further, in *Weber* Judge Anderson implies the existence of a remedy under the Admin Order, noting that a violation of the Admin Order should have been addressed by a petition "made to the court adjudicating the foreclosure action." 2013 WL 4820446 at *3. As the Admin Order is an order of this Court, this Court is the appropriate tribunal to request clarification of its intent; certiorari is appropriate.

CONCLUSION

The petition should be granted.

Dated: 01/23/2023

/s/ Jason Scott Luck
Jason Scott Luck
P.O. Box 47
Bennettsville, SC 29512
843.479.6863 (o)
843.479.7222 (f)
jason@luck.law
Attorney for Petitioner

[4] Even if, contrary to *Jarrell*, this Court finds civil compensatory contempt to not be a valid cause of action, Snyder's motion for summary judgment requested alternatively that it be treated as a motion for sanctions under the Admin Order. (R 412).