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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-in-Equity

Appellate Case No. 2022-000708

Oak Forest Homeowners Association, Inc.,..…….....…...Appellant,

v.

Paul M. Dennison, Mortgage Electronic Registration Systems, Inc., solely as nominee for Branch Banking and Trust Company, LLC and South Carolina State Housing Finance and Development Authority, Defendants,

Of whom Paul M. Dennison is the..……..……Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

I. Did the trial judge commit reversible error in deciding that the Appellant had not proven its case against the Respondent?

STATEMENT OF THE CASE

This is an appeal from an order finding that the Appellant (hereinafter "Oak Forest") failed to carry its burden of proof in a homeowners' association lien foreclosure case. (R. pp. 14-21.) Oak Forest, a nonprofit corporation, claimed to hold a lien against the Respondent, Paul M. Dennison (hereinafter "Dennison") and sued to foreclose that lien. (R. pp. 28-38, 388-90, 396.) Dennison answered *pro se* and continued to represent himself through the trial. (R. pp. 39-54, 58-309.) The case was referred to the Horry County Master-in-Equity, who conducted the trial and took the case under advisement for several years. (R. pp. 7-13, 58-309.) The master ultimately ruled for Dennison, determining that Oak Forest had failed to prove that Dennison ever became a member of Oak Forest and failed to prove that Dennison owed Oak Forest any money. (R. pp. 14-21.)

Eleven days after receiving written notice of the master's order, Oak Forest made a motion to reconsider or for a new trial. (R. pp. 55-56.) The master dismissed Oak Forest's motion as untimely. (R. pp. 23, 24.) The master also ruled that, had the merits of the motions been before her, Oak Forest would not have prevailed on them. (R. pp. 23-24.)

This appeal followed.

ARGUMENT

I. Oak Forest's arguments are not preserved for review.

To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). "Where a matter is not ruled on by the circuit court, the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e)." Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992).

An untimely Rule 59 motion does not preserve error for review. Al-Shabazz v. State, 338 S.C. 354, 364-65, 527 S.E.2d 742 (1999); see Overland, Inc. v. Nance, 423 S.C. 253, 256–57, 815 S.E.2d 431, 433 (2018). "Either party must *timely* file a Rule 59(e), SCRCP, motion to preserve for review any issues not ruled upon by the court in its order." Al-Shabazz, 338 S.C. at 364-65 (emphasis added).

Here, Oak Forest's arguments are not preserved for review. The master's order does not rule on them (R. pp. 14-21), and Oak Forest's untimely motion does not preserve them so that this court can review them. Al-Shabazz, 338 S.C. at 364-65; see Overland, 423 S.C. at 256–57.

A party's unpreserved arguments cannot prevail on appeal. E.g., Hatfield v. Hatfield, 327 S.C. 360, 367, 489 S.E.2d 212, 216 (Ct. App. 1997). The record supports the outcome that Oak Forest failed to prove its case; regardless, however, Oak Forest has not done what it had to do to put its arguments before this court. See Rule 59(b)&(e), SCRCP; Overland, 423 S.C. at 256–57; Al-Shabazz, 338 S.C. at 364-65; Hatfield, 327 S.C. at 367.

Oak Forest is not entitled to reversal on unpreserved arguments. This court should affirm.

II. The record supports the master's finding that Dennison did not join the HOA.

As more than a preponderance of the evidence reveals, Dennison did not become a member of Oak Forest.

At the time Dennison acquired his property involved in this case, the nonprofit corporation that was the Oak Forest homeowners' association subject of the covenants had been dissolved by the filing of articles of dissolution. (R. pp. 315-71, 386-87, 398-401, p. 59 ln. 18-21, p. 60 ln. 13 through p. 61 ln. 13, p. 75 ln. 8 through p. 77 ln. 1, p. 146 ln. 22 through p. 147 ln. 5, p. 187 ln. 21-22, p. 188 ln. 11-17, p. 191 ln. 14-25, p. 209 ln. 15 through p. 210 ln. 3, p. 253 ln. 8-11, p. 254 ln. 2-8.) It therefore could "not carry on any activities except those appropriate to wind up and

liquidate its affairs," as required by S.C. Code Ann. § 33-31-1406. Its permitted activities did not include admitting new members. Id.

Oak Forest contends that Dennison joined by becoming an owner of real estate subject of the covenants, but, regardless of whether the covenants applied to the real estate, Dennison could not have become a member of the corporation at the time he came to own his property, because of the statutory limits on what a dissolved nonprofit corporation can do. Id. Admitting a new member does nothing to wind up or liquidate corporate affairs. Id.

The South Carolina Nonprofit Corporation Act provides "[n]o person may be admitted as a member without his consent." S.C. Code Ann. § 33-31-601. The record does not support that Dennison consented to becoming a member of the association; rather, once he became aware of the dissolution, he boldly and openly communicated to all involved that he was not a member. (R. pp. 14-16, p. 61 ln. 3-8, p. 64 ln. 20 through p. 66 ln. 8, p. 77 ln. 2-15, p. 85 ln. 10-15, p. 112 ln. 15 through p. 113 ln. 2, p. 151 ln. 8-16, p. 152 ln. 11-20, p. 193 ln. 25 through p. 194 ln. 21.) The record supports the master's determination that Dennison never became a member of the association. (R. pp. 16, 17.) Oak Forest knew he was not a member and did not have an obligation to pay assessments to Oak Forest, as it attempted unsuccessfully to convince Dennison to become a member and undertake the obligation to pay assessments. (R. pp. p. 218 ln. 16 through p. 219 ln. 9.)

Oak Forest relies on articles of correction being filed in an effort to un-dissolve the corporation. (R. pp. 501-03.) This ignores that there is a specific statute that governs what needs to be done to undo the dissolution of a nonprofit corporation, and the requirements of that statute were not met.

The process to revoke a nonprofit corporation's dissolution is set out in S.C. Code Ann. § 33-31-1405. This statute is tailored to the situation of corporate dissolution and is more specific than the general articles of correction statute, S.C. Code Ann. § 33-31-124. "Generally, specific laws prevail over general laws," and there is no reason to believe this principle does not apply here. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 412–13, 526 S.E.2d 716, 719 (2000); accord DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, 423 S.C. 295, 814 S.E.2d 513, 518 (2018); Capco of Summerville, Inc. v. J.H. Gayle Const. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006); Ramsey v. County of McCormick, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991). Because there is a more specific statute that addresses exactly this situation, the general statute, S.C. Code Ann. § 33-31-124, does not apply. DomainsNewMedia.com, 814 S.E.2d at 518; Capco of Summerville, 368 S.C. at 142; I'On, 338 S.C. at 412–13; Ramsey, 306 S.C. at 397.

Under the process in S.C. Code Ann. § 33-31-1405, "[w]hen the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation resumes carrying on its activities as if dissolution had never occurred." Id. at (e). That is the situation that Oak Forest very much wants here. But the record contains no evidence that Oak Forest followed or even undertook the revocation process under S.C. Code Ann. § 33-31-1405. Indeed, the revocation process was no longer available to the association by the time it tried to undo the dissolution, as revocation can be done only within 120 days of dissolution. Id. at (a).

The corporation that was dissolved before Dennison bought his property remains dissolved. See S.C. Code Ann. §§ 33-31-1405 & -1406. Dennison did not join it. See S.C. Code Ann. §§ 33-31-601 & -1406. Further, as the old association corporation remains dissolved, the evidence supports a finding that this suit is actually brought by the Oak Forest that is a new corporation with

the same name, created to try to deal with the irrevocable dissolution of the corporation that was a party to the covenants. (R. p. 388, p. 203 ln. 4-8, 14-16, p. 206 ln. 15 through p. 207 ln. 13.) Either way, Dennison never joined the Oak Forest association that was the plaintiff in this case. See S.C. Code Ann. §§ 33-31-601 & -1406.

The master did not commit reversible error in ruling that Oak Forest had failed to prove its case. (R. pp. 16, 17.)

III. A retroactive undoing of Oak Forest's dissolution would adversely affect Dennison, and Dennison is entitled to rely on the dissolution.

But even if the articles of correction had been sufficient to undissolve the corporation, that could still not relate back in time to affect Dennison. "Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed." S.C. Code Ann. § 33-31-124(c). Oak Forest contends that Dennison did not show how he would be adversely affected by retroactively undissolving the corporation back to its dissolution date, but how he would be adversely affected is obvious: Oak Forest would have a claim that Dennison owed it years of assessments in the event that the articles of correction retroactively undid the dissolution. (R. pp. 386-87, 501-03, 523-24.) He would stand to possibly lose his home to Oak Forest's lien foreclosure. In arguing that there is no adverse effect on Dennison, Oak Forest ignores what is plain from the record and the situation that was before the master.

The master did not commit any reversible error by not concluding that Oak Forest's attempt to undo the dissolution related back in time and ensnared Dennison.

IV. As an additional sustaining ground, res judicata supports the decision that Dennison is not a member of Oak Forest.

While the master found that Oak Forest's previous lawsuit against Dennison and others was dismissed without prejudice as to Dennison, the record indicates that it was actually dismissed with prejudice as to Dennison, even if that is not what Oak Forest had meant to do. (R. pp. 14-15, 504-05.) That supplies this court with an additional sustaining ground for the master's ruling.

Oak Forest brought a suit against Dennison and others, claiming they had defamed Oak Forest by stating that the corporation had been dissolved. (R. p. 61 ln. 3-8, p. 103 ln. 17 through p. 104 ln. 19, pp. 504-05.) Oak Forest dismissed that case by stipulation, stating that the stipulation was with prejudice as to certain defendants, who did not include Dennison. (R. pp. 504-05.) Dennison did not consent to that stipulation of dismissal. (R. pp. 504-05.)

Rule 41, SCRCP, states that "*any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, *operates as an adjudication upon the merits*." Rule 41(b), SCRCP (emphasis added). As Dennison did not consent to the dismissal and it was not ordered by the court under Rule 41(a)(2), SCRCP, it was not a dismissal provided for in Rule 41. (R. pp. 504-05.) It was, accordingly, an adjudication upon the merits of the former suit, i.e., a dismissal with prejudice. Rule 41(b), SCRCP. The earlier suit's "dismissal with prejudice indicates an adjudication on the merits and precluded subsequent litigation to the same extent as if the action had been tried to final adjudication. Where an action has been dismissed with prejudice, the judgment operates in subsequent litigation to the same extent as if the action had been tried to a final adjudication." Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 773 (Ct. App. 1997).

"[R]es judicata precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action." Duckett v. Goforth, 374 S.C. 446, 464, 649

S.E.2d 72, 81 (Ct. App. 2007). Res judicata bars the parties to the first case "from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). A litigant's claim is barred under res judicata even when he "is 'prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action or (2) [t]o seek remedies or forms of relief not demanded in the first action.'" S.C. Pub. Interest Foundation v. Greenville County, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) (emphasis in original, quoting Restatement (Second) of Judgments § 25 (1982 & Supp. 2012)).

The dismissal of the earlier suit with prejudice necessarily decided that the foundational premise of that suit – that Oak Forest had not been dissolved and that Dennison and the others were members of it – was wrong on the merits. Rule 41(b), SCRCP; Jones, 483 S.E.2d at 773. Res judicata barred Oak Forest from success in the instant case.

The master did not commit reversible error in finding against Oak Forest.

CONCLUSION

For more than one reason, Oak Forest has not shown it is entitled to reversal of the master's trial order. This court should affirm.

Respectfully submitted,

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CERTIFICATE OF COUNSEL REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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