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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr.
Master in Equity

Appellate Case No. 2023-000726
Circuit Court Case No. 2018-CP-23-3124

Rallis Holdings, LLC and Oriole Properties, LLC, ... Third-Party Petitioners,

In RE: Clear Skies Restorations, LLC, Plaintiff, ... Plaintiff,

v.

Ivan Martinez and Paula A. Martinez, ... Defendants,

of whom

Ivan Martinez and Paula A. Martinez are the ..... Appellants,

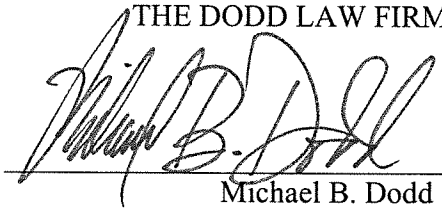
and

Oriole Properties, LLC and Rallis Holdings, LLC are the ..... Respondents.

BRIEF OF THE APPELLANTS

(signature page to follow)

THE DODD LAW FIRM, LLC



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May 31, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

STATEMENT OF ISSUES ON APPEAL

This case presents two critical issues on appeal:

1. The Circuit Court issued an order and foreclosure judgment that detailed how the proceeds of the judicial sale would be disbursed. That judgment indicated that two senior mortgage lienholders would be paid first, and then the plaintiff, which held a third-position mechanic's lien-would be paid out of the remaining proceeds. This order was in error, as the record readily reflects. Did the Master in Equity commit error and abuse of discretion by refusing to grant Appellant's motion to correct the court's Order for Judgment and Decree of Foreclosure that was entered on May 8, 2019, having an effect of changing the course and conduct of the sale itself?
2. The Circuit Court issued an order and foreclosure judgment that detailed how the proceeds of the judicial sale would be disbursed. That judgment indicated that two senior mortgage lienholders would be paid first, and then the plaintiff, which held a third-position mechanic's lien-would be paid out of the remaining proceeds. This order was in error, as the record readily reflects. Did the Master in Equity commit error and abuse of discretion by finding that the Third-Party Petitioners and Respondents, Oriole Properties, LLC and Rallis Holdings, LLC were bona fide purchasers for value despite them having knowledge of the error in the order affecting the purchase of the property, and clear error in the foreclosure order, notice of sale, and the intervention by the Master in Equity during the foreclosure auction providing meaningful information contrary to the order and notice of sale to the parties bidding at the sale affecting the sale?

STATEMENT OF THE CASE

This case was commenced by Clear Skies Restoration, LLC ("Clear Skies" or "Plaintiff"), on June 1, 2018, by filing a complaint against Ivan Martinez asserting claims for breach of contract, quantum meruit, statutory attorneys' fees, and to foreclose a mechanic's lien, all arising out of Clear Skies' work repairing Mr. Martinez's roof. (Compl. passim (June 1, 2018); R. p. _.) Clear Skies served Mr. Martinez with the initial summons and complaint on July 1, 2018. (Aff. of Service (filed July 3, 2018); R. p. _.) Mr. Martinez did not respond to the complaint, and Clear Skies' attorney filed an affidavit of default on August 15, 2018. (Aff. of Default (Aug. 15, 2018); R. p. _.) Two orders followed: an order for entry of default, and an order referring the case to Judge Simmons, the Greenville County Master in Equity, to complete the foreclosure. (Order for Entry of Default (Aug. 20, 2018); R. p. _; Order of Reference (Aug. 24, 2018); R. p. _.) Clear Skies

After the case was referred to Judge Simmons, and for reasons that do not appear in the record, Clear Skies filed an amended summons and complaint on September 26, 2018. (Summons and Amended Foreclosure Compl. (Sept. 26, 2018); R. p. _.). The amended summons and complaint added Paula Martinez as a Defendant. (Id.)

Clear Skies thereafter moved for entry of default as to both defendants and the court entered an order for entry of default. (Order for Entry of Default (Dec. 31, 2018); R. p._.). A foreclosure hearing was scheduled, noticed, and held by the court. (Foreclosure Hr'g Tr. at 2-4(filed Feb. 19, 2019); R. p. _.) At the hearing, the fact that the sale would be subject to the senior mortgages was discussed at length by Clear Skies' counsel and the Court. While this discussion must have occurred during the off-the-record discussion reflected by the transcript, counsel for Clear Skies has confirmed, as an officer of the court, that it did happen at the public hearing. The discussions centered around the issue of whether it would be possible to obtain any payoff information from

the senior lien holders prior to the sale which could be used to notify potential bidders of the amount of indebtedness on the mortgage loans to which the bidder's purchase would be subject. (Id.)

The Court issued an order on May 8, 2019, an Order for Judgment and Decree of Foreclosure providing that the Property would be sold for the purpose of satisfying the debt owed to the Plaintiff (due to a mechanic's lien) in the amount of $12,020.48. The Order further provided that Plaintiff's mechanic's lien is junior to two (2) mortgage liens: a) a mortgage to Wells Fargo dated April 6, 2011 in the original amount of $50,000; and b) a mortgage to Sun Trust Bank dated November 25, 2014 in the original amount of $25,000. Order, p. 2. The Order further provided that following the sale, the proceeds would be applied as follows:

> The Master-in-Equity will apply the proceeds of the sale as follows:
>
> FIRST: To the payment of the Mortgage liens;
>
> NEXT: To the payment of the amount of the costs and expenses of this action, including any Guardian ad Litem fee or fees of attorneys appointed under Order of Court;
>
> NEXT: To the payment to the Plaintiff or Plaintiff's attorney, of the amount of Plaintiff's debt and interest, or so much thereof as the purchase money will pay on the same;
>
> NEXT: Any surplus shall be held pending further Order of this Court.

(Order for Judgment and Decree of Foreclosure Sale at 4-5 (May 8, 2019); R. pp._,_-_.)
The foreclosure sale was noticed and advertised. (Aff of Publication (June 4, 2019); R. p. _.) Pursuant to the terms and conditions of that Order, the Property was advertised for sale at auction, and was thereafter sold at an auction on June 3, 2019. After the foreclosure hearing and the Order

being filed, the notice of sale was prepared and then published in The Greenville News In the Notice of Sale, it states, in pertinent part:

> "This property will be **sold subject to** the following mortgage(s)/senior encumbrances: Mortgage to Wells Fargo Bank, N.A. dated April 6, 2011 filed in the Greenville County Register of Deeds Office on May 4, 2011 in Book MO 5117 at Page 5827; and Mortgage to SunTrust Bank dated November 25, 2014 filed in the Greenville County Register of Deeds Office on December 19, 2014 in Book MO 5278 at Page 3522." (Notice of Sale Ad from Greenville News; R. p. ____.)

The foreclosure sale took place on June 3, 2019. Attorney Anna Bullington attended the sale on behalf of Plaintiff. Attorney Bullington has testified that after the auction for the sale of the subject property had begun, and after the auction had elicited bids on the purchase of the property but before the final bids were made, the undersigned Judge reminded the bidders that the Notice of Sale stated the sale was subject to two senior mortgage liens. Plaintiff's total debt was $12,020.45. At the sale, Plaintiff bid as high as $80,000.00. (March 30, 2023 Order and Judgment 3:11-16; R. p. ___.) Bullington confirmed the Court interrupted the bidding and announced to the courtroom that the property was being purchased subject to the two (2) senior mortgage liens during thr rehearing of this matter. (February 28, 2023 Trial Hr'g Tr. 24: 6-13 (filed April 10, 2023); R. p.___.)

The property was sold at auction for $120,100.00 to Rallis Holdings, LLC, of whom Ron Rallis is the sole member who attended the sale and placed the high bid. In the afternoon shortly after the sale, Ron Rallis contacted Attorney Bullington with questions regarding whether the sale was subject to the senior mortgages. Clay Custer of Oriole Properties, LLC also attended the sale.

Mr. Custer has testified that he met with Ron Rallis shortly after the sale where Rallis further questioned Custer as to whether the sale was subject to the senior mortgages. Custer and Rallis agreed at that meeting for Rallis to assign one-half of Rallis Holdings, LLC's interest in the bid to Oriole Properties, LLC. (March 30, 2023, Order and Judgment 3:17-24; R. p. ___.)

Fran Powell, a closing paralegal for the law firm of Guest & Brady, LLC also testified. She testified that Rallis hired Guest & Brady, LLC to handle the title work and property acquisition on behalf of Rallis. Mrs. Powell testified that she discussed the sale with Rallis on the same day of the sale whereby Rallis questioned the inconsistency in the Order versus the Notice of Sale regarding whether the sale would be subject to the senior mortgage liens. Mrs. Powell testified to having sent an email to Attorney Bullington at 2:48pm on the afternoon of the sale wherein she stated:

> "Hope you are doing well. Our client was the successful bidder at the foreclosure auction today for the above property. Your office represented the plaintiff, Clear Skies Restoration LLC. As part of our closing process, we will need to obtain the payoffs of the 1st and 2nd mortgage that the property was sold subject to and the third party bidder believed you may already have this information based on your bid of $80,000.00 at the sale which was above the judgment amount being foreclosed. Our office may have difficulty obtaining the payoffs in light of the fact that we do not have Mr. or Mrs. Martinez' personal information and are inquiring whether you do in fact have the mortgage payoffs information and if you would be able to provide a copy to us for use to payoff the same."

Email from Fran Powell to Plaintiff Attorney admitted at hearing (Feb. 28, 2023); R. p. ___.)

An Affidavit of Attorney Kevin Phillip Brady of the Guest & Brady, LLC law firm was filed in this matter. In Mr. Brady's Affidavit, he states, in part, that "As part of our usual and customary title search of a foreclosure action, we reviewed the entire foreclosure file".

Rallis Holdings, LLC and Oriole Properties, LLC complied with the bid on June 7, 2019 by paying the full bid amount into the Court; and those entities were issued a deed by the Court on June 10, 2019. Their deed was recorded on June 11, 2019, in Deed Book 2568, at page 290 with the Greenville County Register of Deeds Office. At the time this deed was recorded, there had been no motions filed by Plaintiff relative to the Order filed May 8, 2019. (Id. at 4; R. p. ___.)

Thereafter, the Court disbursed proceeds of the bid to the Plaintiff in the full amount of the indebtedness owed to Plaintiff. The Court did not disburse any monies to either of the two (2) senior mortgage holders since no information relative to the payoffs on these mortgages had been provided to the Court. (Id. at 4: 27-28, 5:1-2; R. p. ___.) The court subsequently contacted the attorney for the Plaintiff concerning a return of the funds and the mistake in the order. (Emails between Stokely Holder and Jennifer Boehmke admitted at hearing (Feb. 28, 2023); R. p. ___.)

After being issued a deed, Rallis and Oriole applied to the court for a Writ of Ejectment, as the property remained occupied. On June 12, 2019, an Order for Writ of Ejectment of Defendants Ivan Martinez and Paula Martinez ("Martinez") was entered by the court. On July 2, 2019, after being served with the Order for Writ of Ejectment, Defendant Ivan Martinez filed a Motion to Stay the Order. Subsequent to being served with an Order for a Writ of Ejectment, the Martinezes filed several additional motions. On July 17, 2019, Ivan Martinez filed a Motion for Relief from Judgment and Motion for New Trial. On July 31, 2019, Paula Martinez filed a nearly

identical Motion. A hearing was held on August 1, 2019 on those motions. The attorney for Plaintiff has asserted, and Custer testified confirming the same, that it was during a phone call between Custer and the Plaintiff's attorney during this time frame when Custer informed the Plaintiff's attorney of the inconsistency between the terms of the Order and the terms of the Notice of Sale, at which point the attorney for Plaintiff told Custer that there was a mistake in the Order. This mistake in the Order is evidenced by the disbursement of proceeds to Plaintiff, which the Court staff acknowledged in emails with the Plaintiff's attorney during this same timeframe - whereby the Court staff requested that Plaintiff pay the proceeds back into the Court until the developing issues with the senior mortgages were resolved. In response, the Plaintiff's attorney stated, in part: "That was an error in the Order, which we'll need to address. As the record should reflect, the purchaser would be taking the property subject to the mortgage liens". Thereafter, on August 21, 2019, Clear Skies filed a "Rule 60, SCRCP Motion To Correct Mistake in Order for Judgment and Decree of Foreclosure," and asking for relief pursuant to Rule 60 SCRCP.

After a hearing, and on September 4, 2019, this Court entered an Order which did the following: 1) granted Paula Martinez' Motion; 2) vacated the Foreclosure sale of June 3, 2019; and 3) declared the deed issued to Rallis and Oriole void. The basis of the Court's Order was its belief that service of the Summons and Complaint upon Paula Martinez had not been effective. The Court denied the motion of Ivan Martinez. The Court did not rule at that time on Clear Skies' Rule 60, SCRCP Motion to Correct, asking for relief. On September 16, 2019, at 3:01 p.m., Rallis and Oriole filed a Motion to Reconsider the September 4 Order, with supporting Affidavits. Thereafter, on September 16, 2019, at 4:21 p.m., Clear Skies and the Martinezes filed a Stipulation of Dismissal with Prejudice.

This court denied the Motion to Reconsider filed by Rallis and Oriole, and they both appealed to the South Carolina Court of Appeals. The Court of Appeals in its Opinion reversed and remanded this court's Order of September 4, 2019, citing S.C. Code Ann. §15–39–870(2005) and finding that this court had committed an error of law in vacating the sale. The Court of Appeals did not rule on Clear Skies' Rule 60 SCRCP Motion to Correct or the bona fide purchaser for value issues, noting that this court had not ruled yet on that issue.

Prior to the evidentiary hearing held in this matter on February 28, 2023 the Martinezes formally filed notice to join in Clear Skies' Rule 60 SCRCP Motion to Correct, also seeking relief under Rule 60 SCRCP to which all parties consented and agreed that the Martinizes had standing to join said motion and to present evidence in furtherance of the Motion to Correct and motion for relief and regarding the issue of whether or not Rallis and Oriole were bona fide purchasers under South Carolina law. (March 30, 2023, Order and Judgment 5-6; R. p. ___.)

An evidentiary hearing was held on February 28, 2023 concerning the Rule 60 SCRCP motions and the bona fide purchaser for value issue. Counsel for all parties were present at the hearing. Several witnesses testified, and the parties submitted numerous exhibits into evidence. (Id. at 1; R. p. ___.). The Martinezes asked the court to grant the motion to correct, grant their motion for relief, and to find that the Third-Party Petitioners were not bona fide purchasers for value. On March 30, 2023 the Circuit Court issued an Order in which the Master in Equity ruled, in pertinent part:

"based on the facts of this case, and the controlling opinion in *Fed. Nat'l Mortg. Ass'n v. Brooks*, 304 S.C. 506, 510-511 (Ct. App. 1991), the Court is compelled to conclude that (1) Oriole and Rallis are bona fide purchasers within the meaning of S.C. Code Ann. §15–39–870 (2005); (2) the Court's deed previously issued to them and recorded on June 11, 2019 must

be reinstated; and (3) Clear Skies Motion to Correct [joined by Ivan and Paula Martinez], which was filed over two months after the deed was issued in this matter, must be DENIED." (Id. at 13; R. p. ___.) The Martinezes, and Clear Skies, filed a motion for reconsideration pursuant to Rule 59 (e) of the South Carolina Rules of Civil Procedure ("SCRCP") seeking to reverse the court's order finding the Third-Party Petitioners to be bona fide purchasers for value and to vacate the foreclosure sale. (Mot. To Reconsider (April 10, 2023); R. p. ___.). The court denied that motion. (Order Denying Motion to Reconsider (April 14, 2023; R. p. ___.) This appeal followed.

STANDARD OF REVIEW

A decision to deny a motion under Rule 60 SCRCP and to affirm or set aside a foreclosure sale are decisions within the trial court's discretion. However, the trial court abuses discretion when the conclusions of the court "are either controlled by an error of law or are based on unsupported factual conclusions." *Bloody Point Prop. Owners Ass 'n, Inc. v. Ashton*, 410 S.C. 62, 66, 762 S.E.2d 729, 731 (Ct. App. 2014) (quoting *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012)). This Court reviews questions of law de novo. *Ex parte TLC Laser Eye* Ctrs. (*Piedmont/Atlanta*), *LLC,* 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Miller Constr. Co. v. PC Constr. of Greenwood*, Inc., 418 S.C. 186, 195, 791 S.E.2d 321, 326 (Ct. App. 2016) (quoting *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009) (per curiam)). *Nexstar Media Grp., Inc. v. Davis Roofing Grp., LLC*, 431 S.C. 593, 848 S.E.2d 597 (S.C. App. 2020). A court that does not use discretion—or recognize it has discretion—when discretion exists commits an error of law." *Richardson v. $21,000.00 U.S. Currency & Various Jewelry*, 430 S.C. 594, 846 S.E.2d 14 (S.C. App. 2020).

ARGUMENT

1. **The Master in Equity committed error and abuse of discretion by refusing to grant Appellant's motion to correct the court's Order for Judgment and Decree of Foreclosure that was entered on May 8, 2019.**

Relief from a judgment under Rule 60, SCRCP, rests within the sound discretion of the trial judge. *May v. May,* 428 S.C. 131, 136, 833 S.E.2d 78, 80 (Ct. App. 2019). A trial court abuses discretion when the conclusions of the court "are either controlled by an error of law or are based on unsupported factual conclusions." *Bloody Point Prop. Owners Ass 'n, Inc. v. Ashton*, 410 S.C. 62, 66, 762 S.E.2d 729, 731 (Ct. App. 2014) (quoting *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012)). In order for Rule 60(a) to apply, the mistake in question, "must be one where "there is an inconsistency between the text of an order or judgment and the...court's intent when it entered the order or judgment," which includes an unintended ambiguity that obfuscates the court's original intent." *Landry v. Landry*, 430 S.C. 153, 843 S.E.2d 491 (S.C. 2020). **The Martinezes' and Clear Skies Motion to Correct and the Martinezes' Motions for Relief should be granted.**

In their motion, the Martinezes and Clear Skies asked the court to amend its May 2019 foreclosure order to state that Clear Skies would be paid first out of any proceeds from the sale of the property at auction. The Motion further requested the Court amend its Order and Judgment to state that Oriole and Rallis would take the Property subject to, rather than free and clear of, the two (2) senior mortgage liens. The text of the foreclosure order has great weight in this case. Rule 60(a) SCRCP is applicable when there is a clerical mistake and the mistake is one where "there is an inconsistency between the text of an order or judgment and the ... court's intent when it entered the order or judgment,' which 'includes an unintended ambiguity that obfuscates

the court's original intent.'..." *Id.* "A clerical error 'is a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function.' *Dion v. Ravenel, Eiserhardt Assocs.*, 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct.App.1994) (emphasis added)." *Ex parte Strom*, 343 S.C. 257, 539 S.E.2d 699 (S.C. 2000). In this case, based on the facts presented into evidence, **it is clear that the intention of that court and the Plaintiff from the foreclosure hearing that the foreclosure order should have directed that Clear Skies be paid first and that the property be sold subject to the two senior mortgage liens as opposed to paying off the senior liens with any proceeds.** It is also clear from the testimony and evidence that the foreclosure order as filed did not match that intent in its language. The court's order stated that the proceeds from the sale would be applied to pay off the senior mortgage liens first. The court also interrupted the foreclosure sale to state to all potential bidders and purchasers, that the property would be sold subject to the two senior mortgages, differing from the language of the filed foreclosure order.

Rallis and Oriole were aware of the conflict between the Notice of Sale and the foreclosure order, and they were aware of such conflict on the date of the Sale, which was several days before a Deed was delivered to them. It is undisputed that the Court interrupted the foreclosure sale during the bidding of the property and stated that the purchase would be subject to two senior mortgages which is different than what the foreclosure order stated, thus, varying the terms of the foreclosure order in a manner that, although unintentional, clearly affected the bidding at the sale.

The significance of the difference in how the sales proceeds are to be applied cannot be understated. If, as the foreclosure order reads, the sales proceeds were applied first to "the payment of the Mortgage liens," then the sale could wipe out the senior mortgages, and depending upon the purchase price, the Defendants Martinez may or may not have any amount to claim after

the sale as surplus funds. Additionally, any potential bidder and or buyer would not be concerned with the mortgage liens as they would be extinguished with the sales proceeds. However, if the language of the foreclosure order is changed to reflect the intent of the court, the potential buyer at the foreclosure sale would know that whatever they paid would be in addition to the unknown payoff amounts of the two senior mortgages. The Martinez Defendants as well as the Plaintiff Clear Skies, and maybe others would have the potential right to make a claim of surplus funds. However, because of the error in the foreclosure order, both parties to the case, and all potential bidders and buyers, and the unnamed mortgage holders were affected at the sale. These rights are ones that must be protected. The Supreme Court of South Carolina has held that where an officer making a sale acts in such a way as to influence the sale or provide information that might influence the sale, even if accidental or unintentional, and there is detriment to a party involved, relief can be had. See, *Bonham v. Cave,* 102 S.C. 308, 86 S.E. 681 (S.C. 1915). Here, relief must be granted and the motion to correct should be amended to grant the relief sought, and as a result the foreclosure judgment and subsequent sale should be void.

"A void judgment is one that, from its inception, is a complete nullity and is without legal effect." *Universal Benefits*, 349 S.C. at 183, 561 S.E.2d at 661 (quoting *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)). Whether to grant or deny a motion under Rule 60 "lies within the sound discretion of the judge. *Tobias v. Rice*, 379 S.C. 357, 665 S.E.2d 216, 219 (Ct. App. 2008). "The determination of whether to set aside a foreclosure sale is a matter within the discretion of the trial court." *Bloody Point Property Owner's Ass'n, v. Ashton*, 410 S.C. 62, 762 S.E.2d 729 (Ct. App. 2014). Relief from judgment under Rule 60, SCRCP, rests within the sound discretion of the trial court, and the court's findings will not be disturbed on appeal absent an abuse of discretion. *Diedun v. Diedun*, 362 S.C. 47, 606 S.E.2d 489

(Ct. App. 2004). In this case, because the sale was based upon an order that was mistaken in its intent, the sale was not fair or equitable. The Supreme Court of South Carolina articulated that South Carolina Code Section 15-39-870 "...exists because sound public policy requires that the validity of judicial sales be upheld, if in reason and justice it can be done." *Belle Hall Plantation Homeowner;s Association, Inc. v. John A. Murray,* 419 S.C. 605, 799 S.E.2d 310 (Ct. App.2017) quoting *Cumbie v. Newberry,* 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968). In this case, the sale should not be upheld, because of justice.

South Carolina courts have held that "if a selling officer modifies "terms and conditions of the foreclosure decree in any material way...[it] was a void sale...quoting (Baily v. Baily, 9 Rich.Eq. , 395) , from *Ex Parte Keller* 185 S.C. at 294, 194 S.E. at 20 (quoting *McMaster v. Arthur*, 33 S.C. 512, 515, 12 S.E. 308, 309 (1890))." *Federal Nat. Mortg. Ass'n v. Brooks*, 405 S.E.2d 604, 304 S.C. 506 (S.C. App. 1991). In this case, the uncontroverted evidence shows that the court interrupted the foreclosure sale to give information to potential bidders that differed from and modified the foreclosure order in a material way. As such, the sale is void.

Additionally, the court below had the opportunity to use discretion in making a decision that would have an equitable result but declined to do so. "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Miller Constr. Co. v. PC Constr. of Greenwood*, Inc., 418 S.C. 186, 195, 791 S.E.2d 321, 326 (Ct. App. 2016) (quoting *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009) (per curiam)). *Nexstar Media Grp., Inc. v. Davis Roofing Grp., LLC*, 431 S.C. 593, 848 S.E.2d 597 (S.C. App. 2020). A court that does not use discretion—or recognize it has discretion—when discretion exists commits an error of law." *Richardson v. $21,000.00 U.S. Currency & Various Jewelry*, 430 S.C. 594, 846 S.E.2d 14 (S.C. App. 2020). Here, because the court did not use or

recognize discretion, an error of law was committed, and the decision of the lower court should be reversed.

2. **The Master in Equity commit error and abuse of discretion by finding that the Third-Party Petitioners and Respondents, Oriole Properties, LLC and Rallis Holdings, LLC were bona fide purchasers for value despite them having knowledge of an error in the foreclosure order at the time of sale and prior to receiving a deed.**

In South Carolina, it is well settled that being a bona fide purchaser for value requires "(1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, 'i.e., in good faith and with integrity of dealing, without notice of a lien or defect.'" *Robinson v. Estate of Harris*, 378 S.C. at 146, 662 S.E.2d at 423 (quoting Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006)). The rationale behind the bona fide purchaser statute, S.C. Code Ann. §15–39–870 (2005) "is the well established public policy of protecting good faith purchasers and upholding the finality of the judicial sale."

Oriole and Rallis are not bona fide purchasers for value and the sale must be vacated and set aside. In determining whether Rallis and Oriole were bona fide purchasers within the meaning of the South Carolina statutes, the proper analysis is to look at **facts and information available to the purchaser as of the date that the deed was issued to them**. The courts of this State have established that the determination of a bona fide purchaser status is the date upon which the purchaser acquired legal title, and not the date of the prior foreclosure sale. *Belle Hall Plantation Homeowner's Ass'n v. Murray*, 419 S.C. 605, 799 S.E.2d 310 (Ct. App. 2017). Thus, it is necessary and proper in this case to determine whether the Purchasers can satisfy the elements of a bona fide purchaser prior to the date they acquired legal title.

The Deed in favor of the purchasers in this case was not filed until June 11, 2019. So, the bona fide purchaser analysis in this case must account for the time period up until that date. Accordingly, the next question is whether the purchasers had notice of the defect in the Foreclosure Order prior to June 11, 2019.

The Supreme Court of South Carolina has held that the bona fide purchaser determination for a real estate transaction must include an analysis of both the actual and constructive knowledge of the purchaser. "There are two basic forms of notice by which a purchaser may be charged with knowledge of the rights of another in real property: actual notice and constructive/inquiry notice. *S.C. Tax Commn. v. Belk*, 266 S.C. at 544-43, 225 S.E.2d at 179; *Jones v. Eichholz*, 212 S.C. 411, 48 S.E.2d 21 (S.C. 1948); *Epps v. McCallum Realty Co.*, 139 S.C. 481, 498-99, 138 S.E. 297, 302 (1927)." *Spence v. Spence*, 368 S.C. 106, 118, 628 S.E.2d 869, 875 (2006).

The South Carolina Supreme Court has explained that "actual notice means all the facts are disclosed and there is nothing left to investigate. Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him. Generally, actual notice is synonymous with knowledge." *Id.* (quoting *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, n.6, 504 S.E.2d 117, 122 n.6 (1998) (citations omitted)). "Moreover, 'actual notice may be shown by direct evidence or inferred from factual circumstances." *Id.* (quoting *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 65, 504 S.E.2d 117, 123 (1998) (citations omitted)).

The Supreme Court of South Carolina has held further:

> [I]n the context of a real estate transaction, a purchaser of real property has actual notice of a title defect or other claim, lien, or interest adverse to his own in a particular property when he actually knows about the defect or claim, or when a reasonable person, if made aware of the same information known to the buyer,

> would be charged with actual notice of the defect or claim. Actual notice may consist of facts or conditions observed by a prospective purchaser as well as information conveyed orally or in writing to him. E.g. *Adams v. Willis, 225 S.C. 518, 522, 83 S.E.2d 171, 173 (1954)* (purchaser with actual knowledge that property was subject to lease, as well as fact that service station existed on lot, was charged with knowledge of the lease); *Walker v. Taylor, 104 S.C. 1, 15, 88 S.E. 300, 303-04 (1916)* (where land buyer prior to sale had actual notice, orally and in writing, of stepdaughter's claim of one-third interest in property, buyer was not a bona fide purchaser for value without notice; the stepdaughter's claim "was of interest to him, and he is charged with all the knowledge he could have had that day for the asking. He is charged with this full and complete information in ordinary fairness as well as in law.").

Spence v. Spence, 368 S.C. 106, 118, 628 S.E.2d 869, 875 (2006) (emphasis added).

The facts as described above had, *at the absolute minimum*, the effect of putting Rallis and Oriole in a position where they had a duty to inquire further into the obvious and clear inconsistencies between the Order and virtually every other event, circumstance, filing and representations related to the subject sale to which they had (actual) notice. To determine otherwise would be to award the purposeful ignorance of a purchaser. But, in this case, it is not just any purchaser. In this case, the purchasers, Rallis and Oriole are clearly sophisticated. Testimony makes clear that Rallis and Oriole are sophisticated in the sense of not only knowing the extent and purpose of the underlying record but also the applicable law. Thus, the level of ignorance which must be employed in a case like this to merely try and satisfy the bona fide purchaser analysis is worse than even the eye and ear shutting referenced in *Spence* above. **Rallis and Oriole clearly had actual notice of a potential defect, and thus cannot satisfy the third prong of the bona fide purchaser analysis.**

The South Carolina Supreme Court has also outlined what is to be considered constructive notice/knowledge of a purchaser in the context of a real estate transaction, specifically in relation to a bona fide purchaser analysis. "[C]onstructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts.

Therefore, this person is presumed to have actual knowledge of the undisclosed facts." *Spence v. Spence*, 368 S.C. 106, 118, 628 S.E.2d 869, 875 (2006)(quoting *Strother,* 332 S.C. at 64 n.6., 504 S.E.2d at 122).

Constructive or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world. *Id.* The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim. *Id.; Epps*, 139 S.C. at 499, 138 S.E. at 303 ("recording amounts to notice, whether known or unknown, because the means of information are at hand"). "A purchaser of real property is bound by both actual and constructive notice and has no right to shut his eyes or ears to the inlet of information, and then say he is a bona fide purchaser for value without notice." *Spence v. Spence*, 368 S.C. 106, 118, 628 S.E.2d 869, 875 (2006).

The *Spence* court further held:

> Constructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed. As this Court has explained in a case involving the transfer of real property,
>
> > If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry and which that diligence might not disclose. There must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter.

Spence, *supra* (quoting *Black v. Childs*, 14 S.C. 312, 321-22 (1880)).

In this case, based on the facts presented into evidence, it is clear that Rallis and Oriole were aware of the conflict between the Notice of Sale and the foreclosure order, and they were aware of such conflict on the date of the Sale, which was several days before a Deed was delivered to them. It is undisputed that the Court interrupted the foreclosure sale during the bidding of the property and stated that the purchase would be subject to two senior mortgages which is different than what the foreclosure order stated, thus, varying the terms of the foreclosure order in a manner that, although unintentional, clearly affected the bidding at the sale. **Rallis and Oriole clearly had at the very least, constructive notice of a potential defect, and thus cannot satisfy the third prong of the bona fide purchaser analysis.** This conclusion is in line with controlling case law. The court found in *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, when a successful bidder at a foreclosure sale has knowledge that there could be a claim or defect ... they cannot claim status as a bona fide purchaser for value. See, *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 799 S.E.2d 310, 419 S.C. 605 (S.C. App. 2017).

Additionally, and notwithstanding the insurmountable legal obstacles facing Rallis and Oriole as outlined above, the equity of this case should weigh heavily in favor of setting aside the sale and altering or amending the judgment in this case. The Martinezes and Clear Skies appeal to the recognized "historical power of a court of equity to modify its decree in light of subsequent conditions." *Mr. G v. Mrs. G,* 320 S.C. 305, 311, 465 S.E.2d 101, 107 (Ct. App. 1995). The Plaintiff and Defendants believe that equity demands that the foreclosure sale and judgment be set aside and that this order be reconsidered, altered or amended to afford them relief. **Sales may be set aside when there are "such irregularity in the proceedings as to show that the sale was not fairly made..."** *Wooten v. Seanch*, 187 S.C. 219, 196 S.E. 877 (S.C. 1938). Here, there was

irregularity, regarding the order of application of the sales proceeds in the foreclosure order and in the record and in the modification made to the order by the court at the sale of the property, such that the sale itself could not be fairly made. As is readily apparent, the position taken by Rallis and Oriole is directly at odds with what the Court stated to all of the bidders/potential purchasers in attendance at the subject sale, including the Plaintiff. Oriole and Rallis have continued to assert that their purchase price should be applied towards the (unknown) amount of debt owing on the senior mortgages despite testimony reflecting that Rallis and Oriole knew both the language of the foreclosure order and what was stated by the court at the foreclosure sale, which was different, and modified for all potential bidders and buyers, the language of the foreclosure order. Not only did the Plaintiff have that knowledge based on prosecuting the underlying action, but the Court also told that to all bidders/potential purchasers at the sale itself. At least one potential buyer has stated under oath, in an affidavit that the way the sale was conducted had an effect on bidding. (Mot. To Reconsider (April 10, 2023); R. p. ___.).

Because of the inconsistent understandings between bidders/potential purchasers, it is perfectly reasonable to assume that other bidders/potential purchasers had similar misunderstandings and, as a result, such misunderstandings may have affected the amounts they bid at the sale. Specifically, the other bidders/potential purchasers likely followed the Court's guidance and had an understanding that their purchase/ownership would still be subject to paying an additional amount equal to the debt owing on the senior mortgages (the face principal value being $75,000.00). Accordingly, their bids were likely less than what they would have otherwise been if they had the same purported understanding of the actual Purchasers, resulting in prejudice to the other potential purchasers. Further to the point, the owners/Defendants have also been prejudiced in light of the amount of (additional) surplus funds that would have otherwise been paid

to them[1] if the purchase price was such that it reflected a prospective buyer having to pay off the two senior mortgages.

Accordingly, it is entirely foreseeable and likely that the Court's statement at the sale had a chilling effect on the sale itself. For that reason alone, this Motion should be granted. Additionally, and importantly, *Brooks* and *Keller* establish that **if a selling officer modifies "terms and conditions of the foreclosure decree in any material way...[it] was a void sale**, the master having no authority to sell as he did... quoting (Baily v. Baily, 9 Rich.Eq. , 395) , from *Keller* 185 S.C. at 294, 194 S.E. at 20 (quoting *McMaster v. Arthur*, 33 S.C. 512, 515, 12 S.E. 308, 309 (1890))." Federal Nat. Mortg. Ass'n v. Brooks, 405 S.E.2d 604, 304 S.C. 506 (S.C. App. 1991). Here, the evidence is clear that the court interrupted the sale to announce that the property was being sold subject to the two senior mortgage liens. Thus, the sale was influenced by the unintentional actions of the court while conducting the sale, and as such the sale must be set aside. South Carolina courts have held that where an officer making a sale acts in such a way as to influence the sale or provide information that might influence the sale, even if accidental or unintentional, and there is detriment to a party involved, relief can be had. See, *Bonham v. Cave,* 102 S.C. 308, 86 S.E. 681 (S.C. 1915). While it is the policy of the courts to uphold judicial sales when regularly [and fairly] made... and when it can be done ***without violating principle or doing injustice*...in proper cases the court will set aside a judicial sale.** See, *Poole v. Jefferson Standard Life Ins. Co.*, 174 S.C. 150, 177 S.E. 24 (S.C. 1934). Here, the facts and uncontroverted evidence suggest the sale was not made regularly or fairly, and without injustice being done, and

[1] The Defendants assert that Mr. Martinez is a disabled, former first responder who lives at the home on the subject property with his sons; if the sale is upheld and the Defendant together with his children are evicted, then they will be homeless. The Defendants have also asserted that there is equity in the home, as a result of the Defendant's hard-earned livelihood which ultimately left him disabled after being severely injured on the job. Additionally, Mr. Martinez has dutifully paid the taxes and mortgages on the property since the initiation of this action in 2018, now almost 6 years.

as such it is proper to find that Rallis and Oriole are not bona fide purchasers for value and that the sale must be set aside.

Also, the court has the power to exercise discretion in making this decision. A court that does not use discretion—or recognize it has discretion—when discretion exists commits an error of law." *Richardson v. $21,000.00 U.S. Currency & Various Jewelry*, 430 S.C. 594, 846 S.E.2d 14 (S.C. App. 2020). Here, Appellants ask the court to find that the court did not exercise discretion, where discretion exists, and therefore has committed error of law.

CONCLUSION

South Carolina courts have held that "if a selling officer modifies "terms and conditions of the foreclosure decree in any material way...[it] was a void sale...quoting (Baily v. Baily, 9 Rich.Eq. , 395) , from *Ex Parte Keller* 185 S.C. at 294, 194 S.E. at 20 (quoting *McMaster v. Arthur*, 33 S.C. 512, 515, 12 S.E. 308, 309 (1890))." *Federal Nat. Mortg. Ass'n v. Brooks*, 405 S.E.2d 604, 304 S.C. 506 (S.C. App. 1991). In this case, the uncontroverted evidence shows that the court interrupted the foreclosure sale to give information to potential bidders that differed from and modified the foreclosure order in a material way. As such, the sale is void. **Sales may be set aside when there are "such irregularity in the proceedings as to show that the sale was not fairly made..."** *Wooten v. Seanch*, 187 S.C. 219, 196 S.E. 877 (S.C. 1938). The irregularity in the proceedings of the foreclosure auction make it such that the sale was not fairly made. Additionally, the intervention into the process by the officer conducting the sale to give information that was contrary to what the foreclosure order stated, albeit in line with the court's intent, created confusion, ambiguity, and an unfairly made sale. The court acknowledges in its final order that it interrupted the sale to remind bidders that the sale was subject to two senior mortgage liens. This is directly contrary to what the Order for Judgment and Decree of Foreclosure Sale stated; that is:

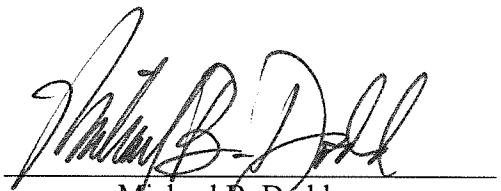
"The Master-in-Equity will apply the proceeds of the sale as follows:

FIRST: To the payment of the Mortgage liens…"

(Order for Judgment and Decree of Foreclosure Sale at 4-5 (May 8, 2019); R. pp._,_-_.)

The court acknowledged this mistake yet refused to recognize and or exercise its discretion to change the clerical error, having grave consequences on all parties involved. A court that does not use discretion—or recognize it has discretion—when discretion exists commits an error of law." *Richardson v. $21,000.00 U.S. Currency & Various Jewelry*, 430 S.C. 594, 846 S.E.2d 14 (S.C. App. 2020). Because the sale is void, the Third-Party Petitioners, Respondents, cannot be bona fide purchasers for value. Rallis and Oriole cannot satisfy the third prong of the three prong analysis: a bona fide purchase, 'i.e., in good faith and with integrity of dealing, without notice of a lien or defect. Here, Appellants ask the court to find that the court did not exercise discretion appropriately, where discretion exists, and therefore has committed error. Additionally, Appellants ask the court to find that the Third-Party Petitioners, Respondents, are not bona fide purchasers for value, and therefore the sale and subsequent deed may be rescinded and set aside, and order vacated. Appellants ask the court to reverse the lower court's ruling.

Respectfully submitted,

By: 

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May 31, 2023