THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUL 10 2013
SC Court of Appeals
69040

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Common Pleas Case No. 2010-CP-23-1622
Appellate Case No. 2012-212447

JP Morgan Chase Bank, National Association,.....Respondent,

v.

Brian Adrian Tucker, Jessica C. Tucker, and Half Mile Lake Homeowner's Association, Inc., Defendants,

Of whom Brian Adrian Tucker and Jessica C. Tucker are.....Appellants.

PETITION FOR REHEARING OR REHEARING *EN BANC* AND MEMORANDUM IN SUPPORT

Appellants (hereinafter, sometimes, "the Tuckers") hereby move and petition, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an Order granting rehearing or rehearing *en banc* in this case and submit the memorandum below in support of the same. The Tuckers respectfully submit that the Court may have overlooked or misapprehended certain points, as the following shows:

I. The Tuckers' compliance with the order mandating that they leave the property or be ejected by the sheriff did not moot their appeal of that order.

The Respondent (hereinafter "Chase") argued that "the Tuckers voluntarily vacated the mortgaged property" and that "[c]onsequently, the order for ejectment is

moot, and there is no basis for this Court to review it." (Initial Brief of Respondent p. 9). This Court apparently accepted that reasoning. That reasoning is flawed, and the appeal of the order is not moot.

As noted in their reply brief, the Tuckers did *not* "voluntarily vacate[] the mortgaged property"; rather, they left their home because they were ordered to do so. (Initial Brief of Respondent p. 9); (R. pp. 8-9). The master's order below directed the Tuckers to deliver possession of the property to Fannie Mae within 45 days of the order and commanded the Sheriff of Greenville County to put Fannie Mae in possession of the property if the Tuckers did not leave. (R. pp. 8-9.) An appeal does not stay a judgment that "direct[s] the sale or delivery of possession of real property." S.C. Code Ann. § 18-9-170; Rule 241(b)(4), SCACR; see Carsten v. Wilson, 241 S.C. 516, 521-22, 129 S.E.2d 431, 434-35 (1963); C-Sculptures v. Brown, 393 S.C. 27, 32, 709 S.E.2d 705, 707-08 (Ct. App. 2011); S.C. Natl. Bank v. Devine Blossom, 321 S.C. 110, 467 S.E.2d 767 (Ct. App. 1996). Accordingly, the master's order was operative in this regard despite the Tucker's appeal, and the Tuckers risked contempt sanctions and forcible ejectment from their home if they did not obey the order. Id. The Tuckers chose not to traumatize their children, pets, and Mr. Tucker's mother by having to leave their home at the point of a gun or by being forcibly dragged from it by sheriff's deputies. That is not "voluntarily vacat[ing] the mortgaged property[,]" as Chase so callously put it. (Initial Brief of Respondent p. 9.)

This Court adoption of Chase's assumption that the Tuckers voluntarily left their home under these circumstances (and, furthermore, to do so without any factual record[1]) and mooted their appeal has led to a result that public policy deems absurd,

[1] See Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 831 (Ct. App. 1984) (Court of Appeals "does not sit as a trial court to receive evidence on disputed issues of fact").

despite the Tucker's express warning to the Court that such an absurd result would be exactly what would happen if the Court did so. As further discussed below, the reasoning employed by the Court here is likely to have what the Tuckers trust is an unintended consequence: encouraging appellants to violate operative, unstayed court orders while a case is on appeal.

In any event, the Tuckers not being in their home does not make moot the issue of whether the master was correct in putting Fannie Mae in possession of their home. A case is nonjusticiable for mootness where, if the party prevails, it has become impossible for the court to grant him any "effectual relief" that would have "practical legal effect upon the existing controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (internal quotation marks omitted). This Court can grant "effectual relief" that would have "practical legal effect upon the existing controversy." Curtis, 345 S.C. at 567. The Court can reverse the master's ruling, whereupon the Tuckers would be entitled to go back into possession of the property.

Further, the Tuckers may be entitled to restitution upon the reversal of the master's order. "A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable." Restatement (First) of Restitution § 74 (1937). A New Jersey court has noted that "[r]estitution on reversal of a judgment is dictated by principles of fairness to the parties and public policy concerns." Bernoskie v. Zarinsky, 394 N.J.Super 421, 425, 927 A.2d 149, 152 (N.J. Super A.D. 2007). That same court, quoting the Restatement, noted that "[a]s a matter of policy, there is a 'need to remedy [a] misapplication of the coercive force of legal process' and to avoid discouraging

compliance with lawful orders not stayed pending appeal." Id. at 426. The Supreme Court of Texas has stated that "[r]estitution after reversal has long been the rule in Texas and elsewhere." Miga v. Jensen, 53 Tex. Sup. Ct. J. 49, 299 S.W.3d 98, 101 (2009). The Supreme Court of the United States has recognized such a right to restitution, noting that "[t]he right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established." Baltimore & Ohio R. Co. v. U.S., 279 U.S. 781, 786 (1929); accord Bank of U.S. v. Bank of Wash., 31 U.S. 8, 17 (1832) ("On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost").

As one author has recently noted, South Carolina law is consistent with the precedent of these other courts. Robert Hill, Supersedeas on a Money Judgment, S.C. Lawyer (S.C. Bar May 2012). In a 1960 case concerning a worker's compensation award, the South Carolina Supreme Court assumed that if money had been paid to the worker per the award that was being reversed, the worker would have been "obligated to make restitution of the amount so received." Case v. Heritage Cotton Mills, 236 S.C. 515, 534, 115 S.E.2d 57, 68 (1960).

For this Court to decide against the Tuckers on mootness grounds also runs directly counter to existing precedent of this Court about the necessity of supporting an argument with authority. Chase never cited any authority for its mootness argument. See S.C. Dept. of Probation, Parole and Pardon Servs. ex. rel. State v. Reynolds, 343 S.C. 465, 540 S.E.2d 480, 482 n. 1 (Ct. App. 2000) (declining "to consider argument because there is no citation of authority, and it is so conclusory as to be an abandonment of this issue on appeal"). That is because there is none. It also

means that Chase abandoned this argument. See id. Yet the Court, in conflict with its own precedent, ruled in favor of Chase on this abandoned argument.

The Tuckers' arguments on this point are not angels dancing on the head of a pin. The outcome of this case matters. On the merits, the master's order to put Fannie Mae in possession of the property lacked any evidentiary support *at all.* If there had been a hearing on whether a writ of assistance should issue in favor of Chase, Chase could not have prevailed at it. (R. p. 117.) As shown by the very deed attached to the ejectment order (presumably submitted by Chase in support of the order being issued), Chase does not own the property subject of this case. (R. pp. 14-15.) The grantee of the master's deed was "Fannie Mae a/k/a Federal National Mortgage Association," not Chase. (R. pp. 14-15.) "A writ of assistance is undoubtedly an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession after he has received the commissioner's or master's deed[.]" James v. Graham, 114 S.C. 107, 78 S.E. 82 (1912).

Fannie Mae never sought a writ of assistance. It was error for the master to order that "the Sheriff of Greenville County is hereby ordered to place Fannie Mae aka Federal National Mortgage Association in peaceful possession of the property." (R. pp. 8-9.) Fannie Mae never looked for such relief, and Chase lacked standing to seek such relief for Fannie Mae.

A reversal by this Court would entitle the Tuckers to go back into possession of the property and may entitle them to restitution. That would be "effectual relief" for the Tuckers that would have "practical legal effect upon the existing controversy."

Curtis, 345 S.C. at 567. Accordingly, the Court misapprehended or overlooked important points in determining this issue to be moot.

II. The master's order is rife with controlling errors of law.

As discussed at length in the Tucker's briefs, the master's decision on virtually every issue subject of his orders below was controlled by errors of law. Examples are noted below.

The master's analysis of the Tucker's motion for relief from the judgment accepted as true all the allegations of Chase's complaint. (R. p. 8.) The master believed that the Tuckers "waived any objections and are deemed to have admitted the allegation by failing to present their objections to this court in a timely fashion. Allegations made in a complaint that are not denied in the answer are **deemed admitted** under Rule 8(d)." (R. p. 8.) The master's analysis was thus controlled by an error of law.

Our courts have never deemed the allegations of a plaintiff's complaint as admitted for the purpose of analyzing a motion for relief from a default judgment. See, e.g., Sundown Operating Co., Inc v. Intedge Industries, Inc., 383 S.C. 601, 608-09, 681 S.E.2d 885, 888-89 (2009) (discussing 60(b) analysis); Lowe's of Georgia, Inc. v. Costantino, 288 S.C. 106, 107-11, 341 S.E.2d 382 (Ct. App. 1986) (relief from default judgment with no mention of deeming plaintiff's allegations admitted in motion's analysis). The availability of a challenge to a default judgment under Rule 60(b), SCRCP, is one of the primary reasons the Rule exists. See Winesett v. Winesett, 287 S.C. 332, 334, 338 S E.2d 340 (1985) ("default judgment may not be appealed"; correct practice is to move for relief from judgment); Belue v. Belue, 276 S.C. 120, 121, 276 S.E.2d 295 (1981) ("no appeal lies for a default judgment"; correct

practice is to move for relief from judgment); Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 99 (2d ed. 2002). If a court were to have to consider all of a plaintiff's allegations as admitted in the context of a motion for relief from a default judgment, the only defenses that would qualify as "meritorious defenses" for the analysis would be affirmative defenses – which existing law tells us is not true. "To establish a meritorious defense, a party is not required to show an absolute defense." Mictronics, Inc. v. S.C. Dept. of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). Here, by deeming all allegations of the complaint admitted for the purpose of analyzing the motion, the master used circular reasoning to make the burden of achieving relief from a judgment practically impossible to meet. This is not the proper analysis and not what is intended by Rule 60(b). See id.

A party may achieve relief from a final judgment where the party demonstrates "fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3), SCRCP. In South Carolina, in order for a party to be entitled to relief under this subsection, the moving party must demonstrate that the fraud, misrepresentation, or other misconduct was extrinsic. Raby Constr., LLP v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 484 (2005); Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000) ("A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'"). Misrepresentation and misconduct is extrinsic when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. Id. (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 362 S.E.2d 176 (1987)); Mr. G. v Mrs. G., 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995). "Relief is granted

for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Chewning v. Ford Motor Co., 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003) (citing Hilton Head, 294 S.C. at 11, 362 S.E.2d at 177). "Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." Id. For example, perjury is usually intrinsic in character. Id. Intrinsic misrepresentations are usually made in court, while extrinsic misrepresentations are usually made outside of court. See id.

Under South Carolina law, fraud is not the only species of misrepresentation or misconduct that can provide a basis to relieve a party from a judgment. Rule 60(b)(3), SCRCP. If only out-and-out actual fraud did so, there would be no reason for Rule 60(b)(3), SCRCP, to state that relief may be granted for "fraud, *misrepresentation, or other misconduct* of an adverse party." (emphasis added). Nonetheless, the master ruled that the Tuckers had to prove actual fraud to prevail under this subsection of Rule 60(b).

The Tuckers argued and presented evidence that Chase actively led them to believe that there were no pending foreclosure proceedings when, in fact, there were. (R. p. 49 ln. 10-13, p. 50 ln. 18-19, p. 52 ln. 8-20, p. 53 ln. 10-16, pp. 87, 89-92, 111.) This activity by Chase falls within the ambit of extrinsic misrepresentation, as it induced the Tuckers to take no action to appear in or contest the foreclosure action. (R. p. 49 ln. 10-13, p. 50 ln. 18-19, p. 52 ln. 8-20, p. 53 ln. 10-16, 87, 89-92, 97-98, 107.) The master erred in the way he conceptualized Chase's representations and the Tuckers' position on them. The master ruled that Chase's misrepresentations – which

he never ruled did not occur – were intrinsic. These representations occurred outside of court and induced the Tuckers not to contest this foreclosure action by lulling them into believing there was no foreclosure action. That is quintessentially extrinsic. Id.

The master's analysis of the motion for relief was controlled by errors of law. These were fundamental errors about what the proper reckoning is when deciding a 60(b) motion. These errors stacked the deck against the Tuckers.

The Court misapprehended or overlooked these points in reaching its decision. Rehearing should be granted.

III. The Court's opinion overlooks the improper analysis used by the master regarding foreclosure intervention.

The master ruled that "HAMP [the Home Affordable Modification Program] is not a defense or cause of action. It is a matter to be decided by the court if raised in the pleadings, which it was not." (R. p. 5.) This ruling was error in at least two respects.

First, both the 2009 South Carolina Supreme Court Administrative Order concerning mortgage foreclosure actions provides that the court with jurisdiction over the foreclosure action is to decide *any* dispute concerning HAMP or the applicability of or process under the Administrative Orders. In re: Mortgage Foreclosures and the Home Affordable Modification Program (HMP), 2009-05-22-01 (S.C. Sup. Ct. dated May 22, 2009). There is no requirement that disputes concerning HAMP be raised by a mortgagor defendant in pleadings. Id. Further, the words of the master's order show how the reasoning it employed is flawed: if "HAMP is not a defense or cause of action[,]" then why would it need to be "raised in the pleadings[?]" (R. p. 5); see Rule 8, SCRCP (generally providing that claims and defenses are what must be stated in pleadings). This sort of Catch-22 reasoning pervades the master's order.

The master's decision is underpinned by his perception that he could not properly hear issues relating to Chase's compliance with HAMP or the Administrative Orders. That perception was wrong as a matter of law. The master's order also placed all the burden of demonstrating Chase's noncompliance with HAMP and the Administrative Orders on the Tuckers, which is neither required nor intended by the Administrative Orders. (R. p. 5); In re: Mortgage Foreclosure Actions, 396 S.C. at 214; In re: Mortgage Foreclosures and the Home Affordable Modification Program (HMP), 2009-05-22-01. This was an error of law.

The master also erred in his factual determination that the Tuckers are ineligible for a HAMP modification. The facts in the record only tend to show that they are eligible for one. Basically, a borrower is eligible to be processed for a HAMP modification if his monthly mortgage payment exceeds 31 percent of his monthly income. (R. p. 114); Home Affordable Modification Program Handbook for Servicers of Non-GSE Mortgages § 1.1.2, available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf. Here, the master's order states that "to qualify [for a HAMP modification], the Tuckers had to have a mortgage debt to income ratio of 31% or less after application of the funds [from the SC help program]. In this case, because of the large arrearage, even after applying the $20,000 from SC Help, the Tuckers mortgage debt to income ratios would still exceed the guidelines." (R. p. 4.) The order also states that "[a]ccording to Chase's analysis the Tuckers mortgage payment to income ratio would be over 216% and would not meet the guidelines." (R. p. 6.)

The first step of a HAMP modification and, indeed, its overall purpose, is to *lower* a borrower's mortgage payments to 31 percent or less of his or her gross

monthly income. (R. p. 115); Home Affordable Modification Program Handbook for Servicers of Non-GSE Mortgages § 1.1.2. Obviously, a borrower who already has "a mortgage debt to income ratio of 31% or less" does not qualify for a modification; indeed, a borrower *must* have a monthly mortgage payment that is greater than 31 percent of his or her monthly income in order to qualify for a HAMP modification. Home Affordable Modification Program Handbook for Servicers of Non-GSE Mortgages § 1.1.2. Per the master's own findings, it is difficult to see how the Tuckers are anything but plainly eligible for a HAMP modification. (R. p. 115); Home Affordable Modification Program Handbook for Servicers of Non-GSE Mortgages § 1.1.2. The master's order is based on a perception of the facts that lacks evidentiary support. Further, the Court's ruling that the Tuckers' argument is barred because what is needed to consider it is not in the record on appeal overlooks that everything necessary to determine the master was wrong about this is in his own factual findings.

IV. The Court's treatment of the mootness issue raised by Chase warrants an *en banc* rehearing.

An *en banc* rehearing "ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR. "[W]hile Rule 219 lists certain grounds on which rehearing *en banc* may be granted, it provides only that rehearing *en banc* '*ordinarily* will not be ordered' except upon the listed grounds. Rule 219, SCACR (2007) (emphasis added). The Court of Appeals has discretion as to whether or not to accept rehearing[.]" Williamson v. Middleton, 383 S.C. 490, 494, 681 S.E.2d 867, 869 (2009).

This is an appropriate case for *en banc* rehearing. In a case concerning a prescriptive easement claim, our Supreme Court held that to require a landowner to physically stop the party claiming an easement from accessing it "would encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes." Pittman v. Lowther, 363 S.C. 47, 610 S.E.2d 479, 481 (2005). Those same considerations require that a person who complies with an order not be deemed to have relinquished his right to seek review of it. The Tuckers did not relinquish any such right here, but this Court's ruling on the mootness issue has placed them, retroactively, in an unresolvable Catch-22 situation in which their choices were to comply with the unlawful order and moot their appeal, put up a bond they cannot afford and which is not required in order for them to appeal, or literally fight to remain in their home.

Further, as discussed above, South Carolina jurisprudence is already on the cusp of recognizing the principle recognized by other courts, including the Supreme Court of the United States, that compliance with an order during an appeal of that order does not moot the appeal but, rather, may expose a respondent who does not succeed on appeal to a restitution claim by the appellant. See Case, 236 S.C. at 534. No case has expressly so held, however. This is a novel question of law in this state.

The public policy reasons and the novel question presented by this case warrant an *en banc* rehearing.

WHEREFORE the Tuckers pray for an Order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211

David L. Thomas
Moore, Taylor & Thomas, P.A.
23 Wade Hampton Boulevard
Greenville, South Carolina 29609
(864) 271-6371

Attorneys for Appellants

July 10, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Common Pleas Case No. 2010-CP-23-1622
Appellate Case No. 2012-212447

JP Morgan Chase Bank, National Association,.....Respondent,

v.

Brian Adrian Tucker, Jessica C. Tucker, and Half Mile Lake Homeowner's Association, Inc., Defendants,

Of whom Brian Adrian Tucker and Jessica C. Tucker are.....Appellants.

PROOF OF SERVICE

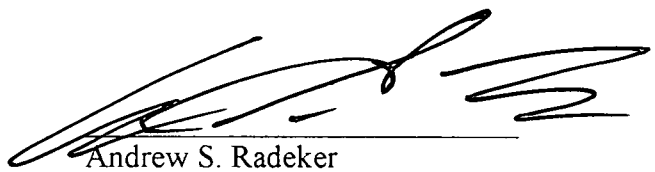
I certify that I served the foregoing petition for rehearing on counsel for the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Hamilton Osborne, Jr., Esq.
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29211

J. Derrick Jackson, Esq.
Tobias G. Ward, Jr. PA
P.O. Box 6138
Columbia, SC 29260

Ronald C. Scott, Esq., Priti M. Patel, Esq.,
and Erica G. Lybrand, Esq.
Scott Law Firm, PA
P.O. Box 2065
Columbia, SC 29202

July 10, 2013



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant