THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Feb 16 2021
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity
2012-CP-42-3549 and 2012-CP-42-2874 (consolidated)

U.S. Bank, NA, as Trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B,................................Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009; TD Bank, NA; The United States of America, acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Jackson L. Munsey, Jr.; Citibank, NA..Defendants,

AND

Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009 ....Plaintiff,

v.

Jackson L. Munsey, Jr., ...Defendant.

Of whom Jackson L. Munsey, Jr., is the..Appellant,

and

Alyce F. Otto, individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009; TD Bank, NA; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; and Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004 are the .... Respondents,

---

BRIEF OF RESPONDENT

Sarah P. Spruill, SC Bar No. 68337
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, SC 29601-2772
864.240.3200
sspruill@hsblawfirm.com

Max T. Hyde, Jr., SC Bar No. 17014
Samantha N. Larkins, SC Bar No. 102790
Hyde Law Firm, P.A.
360 East Main Street, Suite One
Spartanburg, SC 29302
864.804.6330
max@maxhydelawfirm.com
samantha@maxhydelawfirm.com

Attorneys for Respondent Alyce F. Otto, individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 7

I. MUNSEY'S ARGUMENT ON APPEAL RELATING TO THE COMPONENTS OF REVISED EXHIBIT A IS BARRED BY THE LAW OF THE CASE DOCTRINE. 7

II. MUNSEY IS IN DEFAULT AND BARRED FROM RAISING DEFENSES TO LIABILITY. THE MASTER CORRECTLY AWARDED DAMAGES BASED ON THE EVIDENCE PRESENTED AT THE MERITS HEARING AND HIS PRIOR RULINGS. 9

A. The Master properly included the amount of the second mortgage 10

B. The Master correctly used the same components in Revised Exhibit A as in Exhibit A. 11

C. The Master correctly included damages for Munsey's failure to pay Greenspace dues and did not violate Munsey's due process rights in doing so. 12

III. THE MASTER CORRECTLY INCLUDED PAYMENT FOR THE RENTAL VALUE OF THE PROPERTY FROM THE DECEMBER 15 ORDER UNTIL MUNSEY SURRENDERED POSSESSION ON NOVEMBER 1, 2018, AND MUNSEY IS BARRED BY JUDICIAL ESTOPPEL FROM CLAIMING OTHERWISE. 13

IV. THE MASTER CORRECTLY AWARDED JUDGMENT INTEREST. 15

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996)........................ 8
Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310–11, 594 S.E.2d 867, 873 (Ct. App. 2004) 10
Brown v. Rogers, 80 S.C. 289, 61 S.E. 440, 440–41 (1908) 16
Cothran v. Brown, 357 S.C. 210, 215-216, 592 S.E.2d 629, 632 (2004) 14
Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001).. 12
Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969) 8
Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 506-07 (Ct. App. 1988) 10
Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), *abrogated on other grounds by Repko v. Cnty. of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018) 13
Lewis v. Cong. of Racial Equal., 275 S.C. 556, 274 S.E.2d 287 (1981) 10
ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) 8
Newell v. Neal, 50 S.C. 68, 27 S.E. 560, 563 (1897)... 10, 11
Roche v. Young Bros., of Florence, 332 S.C. 75, 81–82, 504 S.E.2d 311, 314 (1998) 9
Shealy v. Doe, 370 S.C. 194, 205-06, 634 S.E.2d 45, 51 (Ct. App. 2006) 15
State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) 12

STATUTES

S.C. Code Ann. § 18-9-170... 13

RULES

Rule 220, SCACR... 14
Rule 241, SCACR... 13
Rule 55, SCRCP... 9
Rule 62, SCRCP... 13

OTHER AUTHORITIES

Jean H. Toal *et al., Appellate Practice in South Carolina* 81 (2d ed. 2002) 8

STATEMENT OF ISSUES ON APPEAL

1. Did the Master correctly order the entry of a default judgment in favor of Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009 ("Otto") in the amount of $453,143.05 (net final judgment amount of $210,143.05), including a rental value for the time Jackson Munsey remained in the property following the December 15, 2015 order in this matter plus post-judgment interest on the December 15, 2015 judgment?

STATEMENT OF THE CASE AND FACTS

On March 4, 2011, Alyce F. Otto, as Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009, entered a Contract for Deed ("Contract") with Jackson Munsey. (R. at 326-45). Under the terms of the Contract, Munsey agreed to pay $1.4 million dollars for Otto's residence and 25 acre farm. (R. at 327). The Contract detailed how those funds were to be paid, including the payment of two notes secured by mortgages (first mortgage and second mortgage) on the property and a third note to Otto (third mortgage). (R. at 327-30). Munsey also agreed to several other terms in addition to the purchase price, including (1) that he would pay all property taxes, (2) that he would not cause the property to become further encumbered, and (3) that he would pay when due all fees and assessments associated with the property owners' association, Greenspace of Fairview, LLC ("Greenspace"). (R. at 331-34).

Munsey almost immediately breached his obligations under the Contract, and two complaints naming Munsey as a defendant followed: a mortgage foreclosure action as to the first mortgage filed by U.S. Bank, NA as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B ("US Bank") on August 21, 2012 ("foreclosure action") and an action to cancel or foreclose the Contract filed by Otto on July 6, 2012 ("Otto action"). (R. at 67-70, 71-83). The Otto action sought the following relief:

> 1. All consideration and payments be forfeited as liquidated damages. The Contract for Deed declared cancelled and the property confirmed free of any claims of the Defendant.
>
> 2. In the alternative, that the property be sold at foreclosure, according to law and practices of this Court, with leave to seek a deficiency judgment, and that the proceeds of the sale be applied as follows:
>
> > A. To the costs and expenses of the within action and sale, and any outstanding real property taxes.
> >
> > B. The payment in full of all sums due the Plaintiff under the Contract for Deed.

> C. To the payment and discharge of any outstanding liens against the property in their order of priority.
>
> D. Surplus, if any, to be distributed according to law.
>
> 3. For such other and further relief as may seem just and proper.

(R. at 70).

Munsey failed to answer either complaint, resulting in the entry of default against him. The actions were referred to the Master in Equity for Spartanburg County ("Master") and consolidated. (R. at 18-23, 26-27). The actions were tried by the Master on November 24, 2015, including the issue of damages. After hearing the evidence, the Master directed that judgment be entered in favor of US Bank and Otto in the respective cases. (R. at 28-30, 31-40). The Order as to the Otto action was filed on December 15, 2015 ("December 15 order"). (R. at 28-30). The Judgment of Foreclosure and Sale in the US Bank matter was filed on December 22, 2015 and set a sale date of February 2, 2016. (R. at 31-40).

The December 15 order included the following findings:

> 2. I find that the parties entered a certain Contract as to property located at 1825 Fairview Farms Road, Campobello, SC on March 4, 2011, by which the Defendant Munsey was to purchase from Otto the subject property. This was to be done by paying a total of One Million Four Hundred Thousand and no/100 ($1,400,000) Dollars for the property. The essence of this transaction was that Munsey was to make a cash downpayment to Otto but then was to take on the responsibility of making the first mortgage payment on the property directly to the first mortgage holder, make the second mortgage payment direction to the second mortgage holder, make a third mortgage payment directly back to Otto, pay the Homeowners Association dues and assessments and any other costs associated with the property. If all such payments were made, the property would ultimately belong to Munsey.
>
> 5. I find that the amount due Otto as a result of the default in the Contract are as shown on the attached Exhibit A, which is established through testimony and evidence presented at the hearing, giving all appropriate credits to Munsey.
>
> 6. I find that, since the first mortgage holder which brought the foreclosure action has waived any deficiency judgment against Otto, the amount actually due the first mortgage holder and for which Otto should have claim against Munsey should be adjusted based on the actual foreclosure sale, the amount of the judgment against Munsey should likewise be adjusted once the foreclose sale occurs.

> Therefore, the actual amount of the judgment against Munsey will be adjusted after the foreclose sale occurs on February 1, 2015. Therefore, this Court reserves the right to enter a Supplemental Order concerning the judgment amount.
>
> 7. I find that since the actual amount of judgment will not be entered until after the foreclosure sale, Munsey's rights to the property shall not terminate until the foreclosure sale and he shall not be required to deliver possession of the property until the time specified in the Order of Foreclosure.
>
> **NOW, THEREFORE, I CONCLUDE AND IT IS ORDERED** that Otto have judgment against Munsey in the amount shown on attached Exhibit A, subject to revision by Supplemental Order following the foreclosure sale.

(R. at 28-30).

Munsey filed a Motion to Alter or Amend Order on January 7, 2016, seeking clarification as to certain portions of the order in the Otto action. (R. at 84-90). On January 13, 2016, the Master issued an order ("January 13 order") directing that if Munsey wanted to stay the foreclosure sale set for February 1, 2016 pending an appeal, he was required to post a bond in the amount of $243,000. (R. at 43-44). Munsey served a Notice of Appeal on January 15, 2016.

On January 29, 2016, Munsey posted the appeal bond. At the same time, Munsey filed an Affidavit of Undertaking agreeing to pay fair rental value for possession of the property and refrain from committing waste during the pendency of the appeal and until the sale of the property "for the purpose of staying the judicial sale of the property." (R. at 357-62). By order filed January 29, 2016 ("January 29 order"), the Master stayed the sale of the property. (R. at 45-46).

The Master entered an order on the motion to alter or amend on April 19, 2016 ("April 19 order"). (R. at 47-50). The April 19 order attached an Exhibit A that had been inadvertently omitted from the filed version of the original order. Exhibit A includes the following measures of damages: First Mortgage, Second Mortgage, Third Mortgage, Carolina First Payments,

Greenspace, Attorney Fees, and Attorney Costs.[1] Exhibit A also includes credits for funds paid by Munsey. Exhibit A showed a total amount of $1,417,403.39. In addition to attaching Exhibit A, the Master expressly found "[t]he proceedings shall be stayed without the requirement of an additional *supersedeas* bond pending the disposition of Munsey's appeal in this matter. The Bond currently on deposit with the Clerk of Court shall stand as bond for the entire case, and hence secures a stay of execution of both the Otto Order and the [Foreclosure Order]." The Master further found that the final judgment amount would be determined after the foreclosure sale. The April 19 order was written after Munsey's appeal was filed, the bond was posted, the foreclosure sale was stayed, and Munsey remained in possession of the property. At that time, there was no way to predict how long Munsey would remain in possession of the property.

Munsey filed an amended notice of appeal on April 27, 2016 to include the April 19 order. This Court affirmed the December 15 and April 19 orders. Munsey unsuccessfully petitioned for a writ of certiorari. On August 6, 2018, this case was remitted to the trial court.

Once this action was remitted, the only matter remaining for determination was to set the amount of the final judgment following the foreclosure sale. Munsey remained in possession of the property until November 1, 2018. (R. at 6). As of that time, he had been in possession of the property without making any payments for more than six years, and nearly three years had passed since the entry of the December 15 order. The property was sold on August 5, 2019 for $783,000. (*Id.*).

[1] While Greenspace dues and the "third mortgage" shown in Exhibit A reflected amounts unpaid by Munsey under the Contract, neither reflected a lien or mortgage against the property at that time. The "third mortgage" was not a mortgage at all, but was instead shorthand for the note signed by Munsey in Otto's favor as a term of the Contract. Greenspace was never made a party to either the Otto action or the foreclosure action.

On August 28, 2019, Otto filed a motion to recover bond and enter judgment. (R. at 91-96). The motion was heard on October 29, 2019, and an additional status conference was held on January 23, 2020. (R. at 5). Thereafter, the Master entered an order on February 17, 2020 ("February 17 order"), granting Otto's motion, revising Exhibit A to reflect a final judgment amount (Revised Exhibit A"), and directing the disbursement of the earlier appeal bond. (R. at 4-13).

The February 17 order does not purport to be a new order on the merits, but rather is a "revision to the judgment amount" following the appeal of the earlier orders on the merits and the foreclosure sale of the property. (*Id.*). As reflected in that order and the attached Revised Exhibit A, the February 17 order subtracts the amount of the first mortgage but leaves all other elements of the chart found in Exhibit A the same, resulting in a total of $233,952.39.

In addition, the Court added additional sums to those shown in Exhibit A/ Revised Exhibit A to provide recovery for the period between the December 15 order and the February 17 order. This recovery included Greenspace dues that were not paid during the pendency of the appeal ($18,000.00), judgment interest on the unadjusted amounts awarded in the December 15 order ($89,922.44), additional attorney's fees ($27,183.22), and the fair rental value of the property for the period between the December 15 order until Munsey relinquished possession of the property on November 1, 2018 ($84,085.00). The Master found that Munsey owed a total of $453,143.05, directed the disbursal of the appeal bond amount of $243,000, and ordered the entry of a net judgment in Otto's favor of $210,143.05. (*Id.*).

Munsey moved to reconsider on February 26, 2020. (R. at 97-103). The Master denied the motion by order dated February 28, 2020. (R. at 14-17). Munsey served a notice of appeal on March 11, 2020.

ARGUMENT

I. Munsey's argument on appeal relating to the components of Revised Exhibit A is barred by the law of the case doctrine.

Munsey did not appeal any component of the damages award in his first appeal. Instead, he appealed the entry of default, and the Master's ruling that he did not have an equitable right of redemption in the property.

It is noteworthy what was considered in connection with the December 15 and April 19 orders. At that time, Otto presented evidence as to the amount due and owing on the second and third mortgages without objection from Munsey. (R. at 141-42, 145-46, 233-35). Munsey's counsel conceded those sums under the second and third mortgage were due and owing. (R. at 169 ("THE COURT: The second and third I am not concerned with because those are obligations that matured and he agreed to pay those obligations pursuant to the terms and that included the balloon, correct? [MUNSEY'S COUNSEL]: Yes, your honor."). Nor did he object to evidence relating to Greenspace dues and assessments. (R. at 146-47, 236-37). Revised Exhibit A leaves these numbers unchanged from those proven and awarded in Exhibit A. Those findings were made based on the evidence presented at the 2015 merits hearing and are supported by that evidence which was admitted without objection.

In addition, Munsey made some of the same arguments he again attempts here, including that there should be no recovery on the second mortgage if Otto did not remain liable for those payments. (R. at 168-70). He also argued about the nature of contract damages, potential windfall recovery, that the foreclosure sale would extinguish any other debts, and the remedies available to Otto. (R. at 196-97, 201). Thus, Munsey's Argument I in his Appellant's brief relating to the components contained in Exhibit A is subsumed in the earlier orders.

Any matters decided in the Master's orders of December 15, 2015 and April 19, 2016 are now the law of the case and may not be disturbed. This is true as to the unappealed portions of the orders, *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding unappealed ruling, right or wrong, is law of the case), and those that were appealed. "A finding by the appellate court contained in a decision in a previous appeal in the same case is the law of the case." Jean H. Toal *et al., Appellate Practice in South Carolina* 81 (2d ed. 2002) (citing *Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969)). After receiving the remittitur,

> the trial court acquire[d] jurisdiction to enforce the judgment and take any action consistent with the appellate court ruling. Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form. The decision of the appellate court is final as to all questions decided. It is the duty of the trial court to follow the decision of the appellate court.

Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) (internal citations omitted).

A review of the December 15 and April 19 orders shows that the components of damages were fixed by those orders, subject only to revision after the foreclosure sale to set the final amount of the judgment and to address the period after the December 15 order in which Munsey retained possession of the property. Thus, to the extent Munsey's current appeal raises issues that could have been raised in his earlier appeal, those issues are barred by the law of the case doctrine.

II. Munsey is in default and barred from raising defenses to liability. The Master correctly awarded damages based on the evidence presented at the merits hearing and his prior rulings.[2]

Munsey's default in this matter is the law of the case, together with the components of the damages award to Otto. In her complaint, Otto alleged that she and Munsey entered into a Contract and she attached the Contract. She asserted two causes of action, breach of contract and foreclosure. In her prayer, she sought relief, including "the payment of all sums due the Plaintiff under the Contract" and "the payment and discharge of any outstanding liens against the property." Lastly, she sought "such other and further relief as may seem just and proper." (R. at 68-70). Munsey was in possession of Otto's property without payment for more than six years after Otto filed her complaint.

The general rules applicable to defaulting parties are well-established. *Roche v. Young Bros., of Florence*, 332 S.C. 75, 81–82, 504 S.E.2d 311, 314 (1998). As stated in *Roche*,

> It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability. Though a defaulting party may be entitled to notice of the damages hearing, that party is limited to cross-examining witnesses and objecting to evidence. Moreover, once a party defaults, the trial court "may conduct such hearings or order such references as it deems necessary and proper" to enter the default judgment. Rule 55(b)(1), SCRCP.

(internal citations omitted). Thus, Munsey was not permitted to present his own witnesses or his own evidence as to damages. Otto's burden was as follows:

> In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered.

[2] Munsey does not appeal any portion of the attorney's fee award reflected on Revised Exhibit A. As such, that award is the law of the case.

Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 506-07 (Ct. App. 1988) (internal citations omitted); *Lewis v. Cong. of Racial Equal.,* 275 S.C. 556, 274 S.E.2d 287 (1981). In considering that evidence, "the trial judge has considerable discretion regarding the amount of damages, both actual or punitive. Because of this discretion, [this Court's] review on appeal is limited to the correction of errors of law. [This Court's] task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310–11, 594 S.E.2d 867, 873 (Ct. App. 2004) (internal citations omitted).

A. The Master properly included the amount of the second mortgage.

As shown above, the payment price for the Contract included the payment of the second mortgage, and the amount due and owing on that mortgage was established and admitted by counsel in the merits hearing in 2015 and in the December 15 and April 19 orders. Munsey unsuccessfully made a similar argument to the Master at the 2015 merits hearing and at the hearing on the motion to alter or amend (although framed slightly differently because the statute of limitations had not yet run). (*See* R. at 211-12). Thus, any argument relating to damages stemming from the second mortgage should be law of the case.

Only in 2019, after seven years of litigation, did Munsey attempt to raise the statute of limitations as a defense to his obligation to Otto. As an initial matter, the statute of limitations is a defense, not a damages issue, and as such Munsey is barred from raising this issue because he is in default.

Moreover, the note was still due and owing when Otto filed her complaint, and the statute had not yet run at the time of the December 15 order. Nor is there any guarantee that the lender may not pursue Otto in the future. These facts all distinguish this case from *Newell v. Neal*, 50

S.C. 68, 27 S.E. 560, 563 (1897) cited by Munsey. In *Newell*, the underlying debt in question had been canceled and satisfied.

Here, Munsey and Otto entered a Contract wherein Munsey agreed to pay $1.4 million for Otto's property. Part of the purchase price included payment of the second mortgage. It is Munsey's default and his dilatory conduct that have extended the resolution of this matter beyond the limitations period. The Master simply sought to award Otto the benefit of her bargain. To reverse on these grounds would reward Munsey for his conduct in this action as to both his breach of the Contract and his pattern of delay following that breach. The Master's award as to the second mortgage is the law of the case and is supported by the evidence. As such, this portion of the award must be affirmed.

B. The Master correctly used the same components in Revised Exhibit A as in Exhibit A.

The Master correctly followed the same format for the table portion of Revised Exhibit A as determined in the original Exhibit A. When the December 15 and April 19 orders are read together, it is clear that the Master only intended to revise the amount to adjust the first mortgage line based on the eventual foreclosure sale of the property and to provide recovery for events in the interim. That is exactly what he did.

Contrary to Munsey's argument, the Master did not leave open all of the line items for subsequent determination, and there is no indication that the Master intended to revisit all damages and hold an entirely new damages hearing at a later date. Accordingly, the other numbers in Exhibit A are the law of the case and were set as a sum certain by the December 15 order. In addition as discussed above, those components were supported by the evidence at the 2015 merits hearing and are all contemplated by the Complaint. Therefore, these damages must be affirmed.

C. The Master correctly included damages for Munsey's failure to pay Greenspace dues and did not violate Munsey's due process rights in doing so.

With respect to the Greenspace dues, the Contract squarely placed that payment obligation on Munsey. In the original damages hearing, Otto established Greenspace dues of $39,200 through November 2015. (R. at 50). Her evidence as to those amounts was admitted without objection, and Munsey had the ability to cross examine the witness. (R. at 146-47, 236-37). Those amounts are supported by the record and are the law of the case. Moreover, Munsey had the opportunity to cross examine the witness so there was not any issue of due process.[3]

In addition, to preserve an issue for review, a party must make a contemporaneous objection to the evidence in question. *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). Munsey's brief only appeals the $39,200.00 Greenspace debt that was established in the 2015 merits hearing. That evidence was presented without objection at the time, and as such, Munsey's argument, raised years later, is not preserved.

---

[3] Munsey's brief does not detail any due process concerns except as to $39,200 of the Greenspace dues and the affidavit of Madelon Wallace submitted with Otto's Memorandum in Support of Proposed Order filed on January 21, 2020. As detailed above, the $39,200 was established by the evidence at the 2015 hearing and was awarded in the December 15 order. Thus, there is no prejudice and no error with respect to that $39,200. Munsey may not change or expand his arguments on these points in reply. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("Additionally, even though [Appellant] more fully addressed the issue in its reply brief, an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

III. The Master correctly included payment for the rental value of the property from the December 15 order until Munsey surrendered possession on November 1, 2018, and Munsey is barred by judicial estoppel from claiming otherwise.

Munsey has appealed the Master's award of a reasonable rental value for the period after the January 13 order in which he remained in possession. Munsey's appeal is limited to the fact that there was an award at all, not the amount of the award.[4]

The Master's order on this point is based on two grounds: (1) his orders of January 13 and 29, 2016 relating to the bond and stay of execution, and (2) S.C. Code Ann. § 18-9-170. As set forth in Argument III of his brief, Munsey has only appealed with respect to the operation of S.C. Code Ann. § 18-9-170. As such, the Master's award of a reasonable rental rate must be affirmed by operation of the two issue rule. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), *abrogated on other grounds by Repko v. Cnty. of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

Munsey fails to mention that as part of the bond process, he agreed to pay a "reasonable rental value" to remain in possession of the property. (Affidavit of Undertaking"). The Master only stayed the sale after the Affidavit of Undertaking was filed. (R. at 6, 45-46).

In granting the stay of execution, the Master had broad discretion in setting the terms under which the foreclosure sale would be stayed. *See* Rule 62, SCRCP; Rule 241, SCACR. The April 19 order makes it clear that these terms were intended to apply to Otto. (R. at 47-50).

As set forth in Rule 241(c)(3), SCACR,

---

[4] Munsey did not object to Otto's testimony as to the amount of the rental value in this period, and he did not present a different value. (R. at 252-53).

> The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate. Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate.

As a result, the Master's January 29 order, issued in reliance on Munsey's representations, was well within his discretion.

Munsey's appeal on this issue is also precluded as a matter of judicial estoppel.[5] In exchange for being granted a stay of execution pending the earlier appeal in this matter, Munsey filed an Affidavit of Undertaking agreeing to post a bond, to pay reasonable rental value, and to avoid waste on the property in the meantime. (R. at 45-46, 47-50, 357-58). The stay was only issued after and in reliance on Munsey's representations. (R. at 6, 45-46, 47-50). Thus, Munsey received the full benefit of that bargain, but now seeks to avoid his rent obligation.

The elements of judicial estoppel in South Carolina are as follow:

> (1) two inconsistent positions taken by the same party or parties in privity with one another;
> (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
> (3) the party taking the position must have been successful in maintaining that position and have received some benefit;
> (4) the inconsistency must be part of an intentional effort to mislead the court; and
> (5) the two positions must be totally inconsistent.

Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). Here, Munsey has taken totally inconsistent positions in this action about his willingness to pay the fair rental value of the property for the time period after the Court entered its December 15, 2015 order. He took one

[5] Although not raised before the Master, this Court may affirm for any reason appearing in the record. Rule 220, SCACR.

position in order to receive a stay of execution and remain on the property; he has now taken the opposite position when the time has come to pay the rent. The only inference to be drawn is that he never had any intention to pay the fair rental value and that he intentionally misled the Master to retain possession rent free for as long as possible.

For all of these reasons, the Master's ruling as to a reasonable rental payment must be affirmed.

IV. The Master correctly awarded judgment interest.

As discussed above, the Master's December 15 order was not undone by the April 19 order. He merely stated that the final amount would be adjusted and final judgment entered following the sale of the property. The February 17 order states that these portions of the award "shall not be amended." (R. at 7). As a result of Munsey's own actions, he remained in possession of the property for three years after the entry of the December 15 order with no payment to Otto in any amount during that period. The Master appropriately awarded judgment interest on the portions of that order that were not subject to revision.[6]

The December 15 order recites that it is a judgment in favor of Otto and against Munsey. (R. at 28-30). The April 16 order recites that execution of that judgment was stayed by posting of the appeal bond. (R. at 47-50). As set forth in the statute, "A money decree or judgment of a court enrolled or entered must draw interest according to law." S.C. Code Ann. § 34-31-20(B). Here, the December 15 order was entered, and it is clear from that order and the later April 19 order that

[6] Otto notes that this argument appears to have been abandoned. It is four sentences long, completely conclusory, and does not cite any authority other than the statute. *See Shealy v. Doe*, 370 S.C. 194, 205-06, 634 S.E.2d 45, 51 (Ct. App. 2006) ("[W]hen an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal.").

the only revisions contemplated to Exhibit A were to adjust the total for the first mortgage after the sale. The other components were set.

The finality as to these numbers supports the award of interest under the statute. *See Brown v. Rogers*, 80 S.C. 289, 61 S.E. 440, 440–41 (1908) ("Judge Purdy's decree was in reality the final adjudication of the rights of the parties, and of the amount due by the defendant. . . . [T]he result was a certainty, adjudicated and fixed as if resultant figures had been written in the decree. . . . The decree of Judge Purdy was, in substance, we have shown, a decree for the payment of a certain sum of money, and under section 1660, Civ. Code 1902, the amount fixed by it bore interest from its date."). Munsey should not benefit from his own pattern of delay by now claiming Otto is not entitled to any interest award as to the matters that were decided in 2015.

CONCLUSION

For all of these reasons, the Master's orders in this action should be affirmed.

Respectfully submitted,

s/ Sarah P. Spruill

Sarah P. Spruill, SC Bar No. 68337
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, SC 29601-2772
864.240.3200
sspruill@hsblawfirm.com

Max T. Hyde, Jr., SC Bar No. 17014
Samantha N. Larkins, SC Bar No. 102790
Hyde Law Firm, P.A.
360 East Main Street, Suite One
Spartanburg, SC 29302
864.804.6330
max@maxhydelawfirm.com
samantha@maxhydelawfirm.com

Attorneys for Respondent Alyce F. Otto, individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009

February 16, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Feb 16 2021
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity
2012-CP-42-3549 and 2012-CP-42-2874 (consolidated)

U.S. Bank, NA, as Trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B, ... Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009; TD Bank, NA; The United States of America, acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Jackson L. Munsey, Jr.; Citibank, NA. .... Defendants,

AND

Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009 .... Plaintiff,

v.

Jackson L. Munsey, Jr.,...Defendant.

Of whom Jackson L. Munsey, Jr., is the ....Appellant,

and

Alyce F. Otto, individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009; TD Bank, NA; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; and Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004 are the .... Respondents,

---

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Respondent, Alyce F. Otto, individually and as trustee under declaration of trust of Alyce F. Otto dated the 17th of November 2009, in this matter complies with Rule 211(b), SCACR.

Respectfully submitted,

s/ Sarah P. Spruill

Sarah P. Spruill, SC Bar No. 68337
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, SC 29601-2772
864.240.3200
sspruill@hsblawfirm.com

Max T. Hyde, Jr., SC Bar No. 17014
Samantha N. Larkins, SC Bar No. 102790
Hyde Law Firm, P.A.
360 East Main Street, Suite One
Spartanburg, SC 29302
864.804.6330
max@maxhydelawfirm.com
samantha@maxhydelawfirm.com

Attorneys for Respondent Alyce F. Otto, individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009

February 16, 2021