THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-in-Equity

Appellate Case No. 2020-0000454

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 the 17th of November 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 the 17th of November 2009; 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 are the ..... Respondents.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Did the lower court err reversibly in finding that the record supports certain amounts awarded to Respondent Otto?

II. Did the lower court err reversibly in denying Appellant his procedural rights regarding cross-examination and objection to evidence?

III. Did the lower court err reversibly in finding that Respondent Otto has a right to recover anything for rental value or otherwise for possession of the real estate at issue?

IV. Did the lower court err reversibly in finding that Respondent Otto has a right to judgment interest for a period before her judgment was rendered?

ARGUMENT IN REPLY

Appellant, Jackson L. Munsey, Jr. (hereinafter "Munsey") submits this brief in reply to that submitted by the Respondent Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009 (hereinafter "Otto"). The other Respondents have chosen not to submit a brief. Munsey will attempt to limit this reply brief to addressing the major flaws in Otto's argument and to responding to assertions now made by Otto in her brief, including ones offered as proposed additional sustaining grounds. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address additional sustaining ground arguments in reply brief). Munsey does not respond to every contention made by Otto because some responses would simply duplicate what is in his appellant's brief.

I. Otto extensively, but incorrectly, relies on the law of the case doctrine.

Much of Otto's counterargument relies on the law of the case doctrine, which establishes that "a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). Moreover, "[t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case." Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). Otto's reliance on this doctrine is misplaced.

For example, Otto is incorrect in contending that "[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."

(Resp. Initial Brief p. 8.) The April 19 order on Munsey's motion to reconsider undid any judgment that was previously rendered in favor of Otto, and Otto conveniently glosses over this lack of finality. The December 15 order indeed provided "that Otto have judgment against Munsey in the amount shown on the attached Exhibit A, subject to revision by Supplemental Order following the foreclosure sale." (R. p. 30.) However, the order issued upon reconsideration of the December 15 order made a substantive change to what was decided in it, a change critical to the analysis of this appeal and which dooms Otto's law-of-the-case argument:

> Further, pending the disposition of Munsey's appeal, no final judgment amount shall be established by either the Otto Order or this Order. A *final judgment amount will only be determined by the Court in a separate damages hearing* subsequent to the foreclosure sale of the Plaintiff's mortgage as ordered by this Court in the Foreclosure Order.

R. p. 49 (emphasis added). This undid the ruling that "that Otto have judgment against Munsey in the amount shown on the attached Exhibit A, subject to revision by Supplemental Order following the foreclosure sale[,]" and, instead, ruled that the lower court would issue a judgment *only* on the basis of the proof later adduced at a damages hearing – not that the amount was dependent on Exhibit A to the December 15 order. (R. pp. 30, 49.)

Any decision that Munsey owed Otto the amounts on Exhibit A had already been undone by the time he brought his appeal of the denial of his motions to set aside default. At most, what Otto had after the April 19 order was a judgment on liability only and not on damages. (R. pp. 30, 49.) Munsey was, thus, no longer aggrieved by the previous, undone adjudication "that Otto have judgment against Munsey in the amount shown on the attached Exhibit A, subject to revision by Supplemental Order following the foreclosure sale." (R. pp. 30, 49.) Munsey could not have appealed that particular ruling, which was no longer in effect.

Rule 201(a)&(b), SCACR. At the time of his previous appeal of the denial of his motions to set aside default, no "final judgment, appealable order or decision" as to the amount or components of what Otto was entitled to recover was any longer in existence. Id.; (R. pp. 30, 49.)

In arguing that "any argument relating to damages stemming from the second mortgage should be the law of the case," Otto misunderstands that it was impossible for Munsey to appeal a judgment of damages that was unrendered at the time of his previous appeal. (Resp. Initial Brief p. 10.) The record of what proof was adduced of Otto's damages was not made until the damages hearing, which was held October 2019. None of the issues subject of this appeal could have been raised in Munsey's prior appeal, because the issues were created by the master's decision following the October 2019 damages hearing.

Otto argues, as the master seemed to think below, that the master had to use components and amounts from Exhibit A that was intended to be filed with the December 15 order. (R. pp. 5-7, 9, 11-12, 28-30, 48, 50.) Rule 54(a), SCRCP, provides that a judgment is an order that finally determines the rights of the parties to the litigation. Had the master left alone his December 15 ruling about judgment debt components subject to later revision, that would have been error, as "[t]here is no procedure allowing a continuing judgment[,]" Norris v. Heyward, 312 S.C. 67, 439 S.E.2d 264 (1993), and Munsey probably would have been obligated to appeal that ruling at that time – but that is not what the master did. (R. pp. 30, 49.) Instead, he undid that incorrect ruling. (R. p. 49.) The law of the case here is that the April 2016 order establishes that a judgment in Otto's favor as to the damages components or amounts had not been rendered at that time and that Otto's damages would be established only at a later damages

hearing. (R. p. 49); see Judy, 381 S.C. at 458; Ross, 328 S.C. at 62. Otto did not appeal that order.

The law of the case doctrine does not bar this court from reversing the decision subject of this appeal. See Judy, 381 S.C. at 458; Ross, 328 S.C. at 62.

II. Otto seems ultimately to agree that Munsey was deprived of procedural due process.

Otto asserts that "Munsey was not permitted to present his own witnesses or his own evidence as to damages." (Initial Brief of Respondent p. 9.) Otto makes a straw man argument, however, since this is not a point that Munsey argues. See State v. Smith, 298 P.3d 1138 (Kan. App. 2013) ("straw man argument is where the arguer wishes to respond to an argument of his or her choosing and not one that is actually presented"). Rather, Munsey points out that "[t]he master denied [him] his procedural rights regarding cross-examination and objection to evidence," rights Otto admits Munsey has. (Initial Brief of Respondent p. 9.) Otto quotes Roche v. Young Brothers of Florence in stating that a defaulting party's procedural rights are "limited to cross-examining and objecting to evidence," which are the precise rights that the lower court denied Munsey, giving rise to this component of the appeal. 332 S.C. 75, 81–82, 504 S.E.2d 311, 314 (1998). In quoting Roche, which squarely supports Munsey's argument here, Otto seems to agree (despite saying otherwise) that Munsey was deprived of his right to cross-examine and object to evidence during the October 2019 hearing.

While Otto is correct in stating that "review on appeal is limited to the correction of law," this denial of procedural due process was a structural defect in the process the master used to determine the amount of Otto's judgment. (Initial Brief of Respondent p. 10 (citing Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310-11, 594 S.E.2d 867, 873 (Ct. App. 2004)); accord LaSalle Bank Natl. Assn. v. Davidson, 386 S.C. 276, 688 S.E.2d 121, 123

(2009). Structural defects are correctable errors of law. Blackmon v. Weaver, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005). About structural errors, this court recently observed as follows:

> In the past half century, courts have attempted to divide constitutional errors into two categories: trial errors and structural errors. In general, trial errors that are harmless do not justify reversal. Structural errors, on the other hand, are reversible per se, unredeemable by the harmless error doctrine. See Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017) (delineating three broad rationales for classifying an error as structural); State v. Rivera, 402 S.C. 225, 246–47, 741 S.E.2d 694, 705–06 (2013) (differentiating between structural errors and trial errors subject to harmless error review).

State v. Wright, Op. No. 5782 (S.C. Ct. App. filed Nov. 18, 2020) (Shearouse Adv. Sh. No. 45 at 22, 25).

Otto argues that Munsey "had the ability to cross-examine the witness" on the Greenspace debt at a hearing held in 2015. (Initial Brief of Respondent p. 12.) As discussed below, that is of no moment, as that was not the hearing at which Otto was required to adduce her damages proof. Munsey was not allowed to cross-examine the affiant who gave the affidavit testimony that was submitted after the 2019 damages hearing was held. (R. pp. 380-83.) He could not, over four years before the affidavit was given, have cross-examined that affiant about the statements in the affidavit. (R. pp. 380-83.)

III. What happened at an earlier hearing cannot be used as a substitute for what happened (and did not happen) at the time the court set for the damages hearing to determine in what amount it would issue judgment for Otto.

Otto contends that the master's award, or at least some of it, was "supported by the evidence at the 2015 merits hearing[.]" (Initial Brief of Respondent p. 11.) The law of the case, however, was that a "final judgment amount [would] *only* be determined by the Court in a separate damages hearing" – a damages hearing that was held in 2019, not in 2015. (R. p.

49.) The lower court was obliged to rule on the basis of what Otto proved by the preponderance of the evidence at the damages hearing the court set. Lewis v. Cong. of Racial Equal., 275 S.C. 556, 274 S.E.2d 287 (1981); Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 506-07 (Ct. App. 1988). What Otto argues would be like a court making its trial decision taking into account a piece of evidence that was filed in opposition to a summary judgment motion but never introduced at trial.

The master ruled that he would decide what judgment Otto would get based on the proof adduced at "a separate damages hearing" that was held, as it could only be, after the 2015 hearing that had already taken place. (R. p. 49.) It is disingenuous for Otto to argue that the master was allowed to ignore his own order and that he was allowed to treat things that happened at other times as though they happened at a damages hearing in which they plainly did not occur.

IV. Not until after the damages hearing was any order issued ruling that Otto was entitled to rental value of the subject property, and she is not.

Otto argues that the two-issue rule bars Munsey from success on the ground that Otto was not entitled to a judgment for rental value of the real estate that had been involved in this case, since Munsey did not appeal "(1) [the master's] orders of January 13 and 29, 2016 relating to the bond and stay of execution[.]." (Initial Brief of Respondent p. 13.)

A fundamental problem with Otto's argument in this regard is that neither of those orders stated that Otto would be entitled to recover any rental value. (R. pp. 43-46.) The January 13 order set the amount of bond for Munsey to post to prevent U.S. Bank's foreclosure sale from occurring during the pendency of the appeal, and the January 29 order noted that he had deposited the bond amount. (R. pp. 43-46.) The order subject of this appeal provides, in relevant part:

> On January 13, 2016, this Court ordered that Munsey post an appeal bond in the amount of $243,000.00 to secure payment of the "fair rental value" of the subject property and to pay for the cost of repair of potential waste to the property during the course of Munsey's appeals according to S.C. Code Ann. Section 18-9-170[.]

(R. p. 8.)

The lower court ordered that the bond would secure "payment of the 'fair rental value' . . . according to S.C. Code Ann. Section 18-9-170[.]" As discussed in Munsey's appellant's brief, S.C. Code Ann. § 18-9-170 does not provide for someone in Otto's position to be paid anything.

Further, Otto sees this as a phantom second ground for the master's ruling, since the master's order giving judgment to Otto does not state that his prior orders about appeal bonds required him to give judgment for fair rental value to Otto. (R. pp. 1-13.) Rather, the master concluded, incorrectly, that S.C. Code Ann. § 18-9-170 required him to award fair rental value to Otto. Munsey argues that the master was wrong about that. There is no two-issue problem here. "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." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). There is no unappealed ground on which the master ruled that Otto was entitled to rental value.

The only time that the master ruled that a fair rental value would be or even could be paid from the bond amount *to Otto* was in 2020. (R. pp. 8-9.) His order does not state that he ruled that way previously, because he did not. (R. pp. 1-13, 43-49.) The master's fundamental failure to understand that S.C. Code Ann. § 18-9-170 provides for the payment of fair rental value after appeal *to a party who holds a judgment directing the sale of land* that was affirmed

is where he went wrong and is the crux of Munsey's appeal in this regard. The only party who could have been in a position to recover fair rental value under S.C. Code Ann. § 18-9-170 – the sole basis on which the master ruled that Otto was – was U.S. Bank. (R. pp. 8-9.)

Nor does Munsey have a judicial estoppel problem here. Munsey's affidavit of undertaking does not state that he agreed that Otto should be paid one dime out of the bond money, nor does Otto point to anything Munsey ever did in which he took the position that Otto should be paid any rental value from the bond money or from anything else. (R. pp. 357-58.) The record does not contain evidence that Munsey took a position inconsistent with what he argues now, much less that all five elements of judicial estoppel are present. See Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

As discussed in Munsey's appellant's brief, no evidence to the effect that Munsey's breach of contract deprived Otto of rental income or of possession of the real property was ever adduced. As also discussed in Munsey's appellant's brief, the idea that this is a part of Otto's damages does not make sense.

V. Otto misses the point about the second mortgage debt.

With regard to the second mortgage debt argument, Otto is either being obtuse or trying to misdirect the court, or perhaps both. Munsey does not "attempt to raise the statute of limitations as a defense to his obligation to Otto." (Initial Brief of Respondent p. 10.) Munsey does not contend that Otto's suit against him is barred by the statute of limitations. Munsey, rather, points out to the court that, when the time came for Otto to prove her damages, she adduced no proof to the effect that she had suffered any with regard to the second mortgage debt. (R. p. 247, p. 251 ln. 11 through p. 283 ln. 6.) On both direct examination and cross-examination, Otto testified that it had been more than three years since any payment was made

on the TD Bank debt that had been secured by the second mortgage and that no suit seeking to collect that debt had ever been brought. (R. p. 272 ln. 14 through p. 273 ln. 8, p. 280 ln. 16 through p. 281 ln. 7.) Otto does not argue that the three-year statute of limitations under S.C. Code Ann. § 15-3-530 would not apply should TD Bank sue Otto on the second mortgage debt, and Otto does not argue that Newell v. Neal, 50 S.C. 68, 27 S.E. 560, 567 (1897), does not hold that a debt that was once secured by a mortgage is subject to the ordinary unsecured debt statute of limitations once that mortgage ceases to exist. Id.

The preponderance of the evidence was to the effect that Otto has not and likely will never suffer any damages with regard to Munsey not paying off the second mortgage debt. What the master gave Otto was a windfall, not damages of which any proof was adduced.

CONCLUSION

Otto is wrong and bases her arguments on incorrect premises. This court should reverse the master as to the improperly awarded amounts, removing those amounts from the judgment and letting the remainder of the judgment stand. In the alternative, this court should reverse and remand for a new decision on the basis of the evidence that was actually properly before the master or, in the further alternative, remand for a new decision after a new damages hearing.

Respectfully submitted,

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February 22, 2021

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

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

Respectfully submitted,

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