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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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,

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RETURN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly affirm the findings of the Master with respect to certain elements of damages stemming from Jackson Munsey's breach of a Contract for Deed in favor of Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009 ("Otto"), in this default action?

INTRODUCTION

Munsey defaulted on his obligations under a Contract for Deed with Otto and defaulted in responding to Otto's subsequent lawsuit. Otto has been trying to recover since 2012. Munsey has pursued a strategy of delay at every turn, which allowed him to retain possession of the property at issue through November 2018 without payment and, even after the sale, to avoid paying Otto through the present. This Court should deny the Petition and allow this matter to conclude.

This Petition arises from a unanimous, unpublished *per curiam* opinion of the Court of Appeals. It does not present any novel question, does not raise a substantial constitutional issue, and is not in conflict with any prior decision of this Court or the Court of Appeals. Given the foregoing, this case does not warrant discretionary review by this Court pursuant to Rule 242, SCACR.

COUNTER-STATEMENT OF THE CASE AND FACTS[1]

On March 4, 2011, Otto entered a Contract for Deed ("Contract") with 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"[2]) 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

[1] Otto incorporates her Respondent's brief in full by reference.

[2] In addition to agreeing to pay the second note/mortgage, Munsey signed a note in Otto's favor to secure that obligation. (R. at 377).

would pay 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 and consolidated. (R. at 18-23, 26-27). Both actions were tried before 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 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). 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 December 15 order. Exhibit A included the following measures of damages: First Mortgage,

Second Mortgage, Third Mortgage, Carolina First Payments, Greenspace, Attorney Fees, and Attorney Costs.[3] Exhibit A also includes credits for funds paid by Munsey. Exhibit A showed a total amount of $1,417,403.39. The Master further found that the final judgment amount would be determined after the foreclosure sale.

Munsey appealed the December 15 order, the April 19 order, and the orders entered with respect to the foreclosure action, and the Court of Appeals affirmed in an unpublished opinion. (R. at 51-53). Munsey unsuccessfully petitioned for a writ of certiorari. On August 6, 2018, this case was remitted to the Master.

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.*).

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

[3] 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 or lien against the property. 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. (R. at 378-79). Greenspace was never made a party to either the Otto action or the foreclosure action. As such, the foreclosure sale did not remove any lien held by Greenspace. The Otto Trust remained obligated to pay those dues and assessments following Munsey's default. As reflected in the record, Greenspace sued Otto to recover on those outstanding payments. (R. at 271:14-19). To the extent he argues to the contrary on page 7 of the Petition, Munsey is incorrect.

("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 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.

The Court of Appeals affirmed in part and reversed in part in an unpublished, Rule 220, SCACR format opinion. In that decision, the Court of Appeals found that Exhibit A as attached to the April 19 order did not establish the law of the case, but that the Master did not err in considering Exhibit A and the evidence presented at the November 24, 2015 damages hearing in

revising Exhibit A and entering the February 17 order. The Court of Appeals further found that the doctrine of mitigation did not prevent Otto from recovering the sums due on the Second Mortgage and that there was evidence supporting the Master's award with respect to Greenspace dues and assessments. In addition, the Court of Appeals reversed the Master's awards of interest following the December 15 order and a rental value through the sale of the Property.

Munsey filed a petition for rehearing, arguing that the Court of Appeals erred in its interpretation of the April 19 order, erred in finding "Otto never proved that she has sustained or will sustain damages" on the Second Mortgage, and erred in finding that there was evidence to support the Master's ruling as to the Greenspace dues and assessments. The Court of Appeals denied the petition.

ARGUMENT

I. The Master did not err in considering Exhibit A and the evidence presented at the November 24, 2015 damages hearing in issuing Revised Exhibit A.

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 Munsey object to evidence relating to Greenspace dues and assessments. (R. at 146-47, 236-37).

The April 19 order attached Exhibit A and provides that no judgment would be entered until after a foreclosure sale was held. Contrary to Munsey's Petition, there is no suggestion in the April 19 order that Exhibit A and the evidence presented at the November 24, 2015 damages

hearing would not be considered following the sale. Instead, the idea was that the judgment would be finalized at that time.

The Master's intent with respect to these orders is reflected in the following colloquy from the October 29, 2019 hearing:

> MS. LARKINS: We would contend that the rights under the Supplemental Order would be the right to enter a judgment amount as of today for the purposes of our math we simply used when
>
> we were filing the matter. And there is some language that seems to state two things, the amount actually due for the first mortgage holder and for which Otto should have claim against Munsey should be adjusted based on actual foreclosure sale. And the amount of the judgment against Munsey should likewise be adjusted once the foreclosure sale occurs. And then it notes the right to enter a Supplemental Order. So we would argue that this Supplemental Order which would be the order you would be signing as of today or entering your decision would be related to our current figures.
>
> MR. RADEKER: Well the - - -
>
> THE COURT: Let me. The point was at that hearing we didn't know what the property was going to sell for as a result of the first mortgage foreclosure sale. And that was the whole reason for as I recall leaving that open and entering a subsequent hearing or a subsequent judgment in favor of Ms. Otto until the foreclosure sale took place because as I recall - - well I mean the foreclosure sale was supposed to have occurred back then but didn't and it went on and on. MS. LARKINS: Right.
>
> THE COURT: And finally did sell but there was a waiver so the figure from the first mortgage is not relevant.
>
> MS. LARKINS: Right.
>
> THE COURT: So it would seem to me that you take out the top figure on your Exhibit A and the rest of it is what you have got. But I am just saying from what I remember and what I see and what Exhibit A was.

(R. at 266:24-67:20). Given the language of the December 15 and April 19 orders and the statements above from the Master, it is clear that Master expected to consider Exhibit A and the evidence presented at the November 24, 2015 damages hearing following the foreclosure sale.

Consistent with the above, Revised Exhibit A leaves these numbers unchanged from those proven and established in Exhibit A. Those findings were made based on the evidence presented at the November 24, 2015 damages hearing and are supported by evidence which was admitted without objection. As such, this evidence is sufficient to affirm the Master's ruling as to the portions of Revised Exhibit A that were unchanged from Exhibit A. "Evidence received without objection is competent." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 266, 442 S.E.2d 611, 616 (1994); *see also Hanna v. Palmetto Homes, Inc.*, 300 S.C. 535, 536–37, 389 S.E.2d 164, 165 (Ct. App. 1990) (stating "Horton's claim of insufficiency of the evidence to support the amount of the verdict centers upon Hanna's failure to provide a basis for his [] estimate. Such failure, however, goes only to the credibility and weight of the evidence and not to its sufficiency, coming in as it did without objection" and citing numerous cases for the proposition that evidence admitted without objection is competent and sufficient to establish facts and support a verdict). Accordingly, the evidence in the record supports the Master's findings, and the Court of Appeals correctly affirmed those rulings.

II. Munsey is in default and barred from raising defenses to liability.

Munsey's default in this matter is the law of the case. 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.

(emphasis added and 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.

Jackson v. Midlands Hum. 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. &/or C. O. R. E., Inc.*, 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 due on the second note/mortgage.

As shown above, the payment price for the Contract included the payment of the second note/mortgage, and the amount due and owing on that note/mortgage was established and admitted

by counsel in the merits hearing in 2015 and in the December 15 and April 19 orders. Otto was and remains the obligor on the note secured by the second mortgage.[4]

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, and Munsey is barred from raising this issue because he is in default. In addition, a defaulting defendant is not permitted to "produce evidence in rebuttal or in mitigation." *Limehouse v. Hulsey*, 404 S.C. 93, 114 & 116, 744 S.E.2d 566, 578–79 (2013) ("If our courts were to allow a defaulting defendant to fully participate in a post-default hearing, we believe there would be no consequence of default."). Moreover, Munsey did not present the second note/mortgage or present any evidence/ argument showing what the applicable statute of limitations might be.

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 will 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. (R. at 326-44). Part of the purchase price included payment of the second note/mortgage. Munsey signed a note in favor of Otto reflecting that obligation. (R. at 377). It is Munsey's default and his dilatory conduct that have extended the resolution of this matter beyond what Munsey contends is the limitations period. The Master simply sought to award Otto the benefit of her bargain with respect to the second note/mortgage. If Munsey had not breached his

[4] Moreover, Munsey remains obligated to Otto under the note he signed concurrent with the Contract to secure his payment obligation as to the second note/mortgage. (R. at 377).

agreement with Otto, there would be no risk to Otto under the second note/mortgage. The Court of Appeals correctly affirmed the Master's determination on this point, citing that there was no evidence in the record showing that the second note/mortgage had been forgiven or that the lender would not attempt to collect. To grant further review 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.

B. 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. (R. at 334). In the November 24, 2015 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). As discussed above, the finding as to the $39,200.00 shown on Exhibit A and Revised Exhibit A is supported by the evidence and must be affirmed.

In addition, Otto testified at the October 29, 2019 hearing that the Greenspace fees were $500 per month. (R. at 255:10-16). The Master awarded an additional $18,000 (beyond that determined in Exhibit A) to reflect the time period between December 2015 and the sale of the property in November 2018. (R. at 12). The Master's award is thus supported by the evidence, and the Court of Appeals correctly affirmed. Given the evidence presented without objection to the Master, any consideration of the affidavit submitted after the damages hearing, whether error or not, was harmless and cumulative to the evidence in the record. *See Campbell v. Jordan*, 382 S.C. 445, 453, 675 S.E.2d 801, 805 (Ct. App. 2009) ("When improperly admitted evidence is merely cumulative, no prejudice exists, and therefore, the admission is not reversible error.").

Thus, the Court of Appeals did not err, and this argument does not present an issue warranting review by this Court.

CONCLUSION

Munsey has failed to present any argument in his Petition that implicates the considerations listed in Rule 242(b), SCACR. Nothing about the opinion of the Court of Appeals is inconsistent with binding precedent, nor does the Petition present any question of exceptional importance. Munsey is in default and the evidence supports the Master's awards relating to the second mortgage and the Greenspace dues and assessments. Quite simply, Munsey wishes the outcome had been different and wants to prolong the appellate process as long as possible so that he can avoid paying Otto. Therefore, the Petition must be denied.

Respectfully submitted,

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October 2, 2023