

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

ON PETITION FOR WRIT OF CERTIORARI

Appellate Case No. 2023-001385

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.....Petitioner,

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.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

- 1) Should this Court reverse the master's award, upheld by the Court of Appeals, of \$177,564.00 for debt to TD Bank that Respondent Otto has never had to pay and which would be barred by the statute of limitations if TD Bank sued to collect it?
- 2) Should this Court reverse the master's award, upheld by the Court of Appeals, of \$57,200.00 for debt to a property owners' association, where the record at the damages hearing lacked evidence from which this award could be based?

ARGUMENT IN REPLY

Petitioner (hereinafter "Munsey") has not "pursued a strategy of delay at every turn," as Respondent Otto (hereinafter "Otto") contends in her return. (Return to petition for certiorari p. 2.) A review of the record shows that, to the contrary, Otto has, at every turn, sought more than what the law entitled her to get. The master-in-equity gave it to her. The Court of Appeals blessed that windfall, a windfall in the hundreds of thousands of dollars.

This Court is the last stop. If this Court does not grant certiorari and reverse, Otto will have succeeded in taking more from Munsey than his default under their land purchase contract ever entitled Otto to get. The record here shows definitively that the master awarded Otto damages she has never suffered and likely never will.

I. Otto's return – and the Court of Appeals' decision – ignores the plain language of the April 2016 order.

Otto now argues that "there is no suggestion in the April 19 [2016] order that Exhibit A and the evidence presented at the November 24, 2015 damages hearing

would not be considered following the [foreclosure] sale.” (Return to petition for certiorari pp. 7-8.)

“The lady doth protest too much, methinks.” William Shakespeare, Hamlet, Act III, sc. ii. Otto cannot, through forceful argument, change what the April 2016 order actually says.

The April 2016 order, issued on Munsey’s motion under Rule 59, SCRCPC, expressly undid the grant of the judgment to Otto for the Exhibit A figures and changed the master’s ruling to provide that, “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.)

Under South Carolina law, though, an order is “construed like other written instruments[,]” and, “[i]f the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used.” Weil v. Weil, 299 S.C. 84, 90, 382 S.E.2d 471 (Ct. App. 1989) (quoting 46 Am.Jur.2d Judgments § 73 (1969); 49 C.J.S. Judgments § 436 (1947)).

The plain, unmistakable words of the April 2016 order provided that “[a] final judgment amount [would] *only* be determined by the Court in a *separate* damages hearing” to be held later. (R. p. 49) (emphasis added). Its words would have had to be very different for it to provide that the amount of the judgment against Munsey would be determined cumulatively on the basis of evidence from the November 24, 2015, hearing

and evidence adduced that the damages hearing to be held later. (R. p. 49.) The order quite directly ruled that the amount of the judgment would *only* be determined in the later damages hearing. (R. p. 49.)

This order, which decided the judgment against Munsey would only be determined on the basis of the evidence adduced at the later damages hearing, is the law of the case and was the law of the case at the time the master and the Court of Appeals chose to ignore it. See, e.g., Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009); Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). That they were not allowed to do. Judy, 381 S.C. at 458; Ross, 328 S.C. at 62.

II. Otto tries some sleight of hand. Munsey has never contended that the statute of limitations bars the claim on which Otto sued him.

Otto makes a straw man argument that Munsey is “attempt[ing] to raise the statute of limitations as a defense to his obligation to Otto.” (Return to petition for certiorari p. 11.) That has never been what Munsey has argued. Otto mischaracterizes Munsey’s argument as one against which she has an easier time defending.

Otto’s counsel conceded at oral argument that the contract between Otto and Munsey required Munsey to pay the TD Bank debt. If Munsey had performed fully under the contract, Otto would not have to pay the TD Bank debt, since Munsey would have paid it. (R. pp. 326-45.) If the contract had been performed, Otto would not have gotten the money subject of the TD Bank debt – the money the master awarded to her. Otto, rather, just would not have been exposed to a potential judgment against her by TD Bank for that debt. (R. pp. 326-45.) Since the statute of limitations has run on TD Bank’s claim against Otto on that debt, Newell v. Neal, 50 S.C. 68, 27 S.E. 560, 567 (1897), Otto is, with regard to the TD Bank note debt, in the same position she would

be if Munsey had performed the contract – not exposed to a judgment in favor of TD Bank and not out money paid to TD Bank.

With regard to the TD Bank debt, Otto’s damages are nonexistent.

The master’s award to Otto of the TD Bank debt is not connected to “the loss actually suffered by the contractee as the result of the breach.” Collins Holding Corp. v. Landrum, 360 S.C. 346, 350, 601 S.E.2d 332 (2004) (internal quotation marks omitted). The Court of Appeals erred in affirming it, and this Court should grant certiorari and reverse it.

CONCLUSION

The Court should grant a writ of certiorari in this case.

Respectfully submitted,

/s/ Andrew S. Radeker
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