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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Circuit Court Judge

Appellate Case No. 2022-001597
Case No. 2011-CP-40-02052

Capital Bank, N.A., formerly known as NAFH National Bank,
successor in interest to Carolina National Bank and Trust Company,
and to First National Bank of the South,.....Appellant,

v.

Rosewood Holdings, LLC, D. Christopher Twitty, and
First Citizens Bank and Trust Company, Inc.,..... Defendants,

Of Whom Rosewood Holdings, LLC and D. Christopher Twitty are Respondents.

FINAL REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. Borrowers concede or do not dispute numerous assertions by Lender.

Borrowers “accept [Lender’s] statement of the case” in its Brief of Appellant. (Init. Resp. Br. 1). Thus, Borrowers are “bound by the matters stated or alleged in [Lender’s] statement of the case.” Rule 208(b)(2), SCACR. Therefore, Borrowers concede that the findings and rulings in the Foreclosure Decree and the Deficiency Judgment are the law of this case. (Init. App.Br. 6). This includes the ruling in the July 2012 Foreclosure Decree that Lender would have a deficiency judgment in the future “*if* the proceeds of [the judicial] sale [were] insufficient” to pay the total debt owed by Borrowers to Lender. (R. 24, ¶ 8) (emphasis added). It also includes the finding and ruling in the July 2015 Deficiency Judgment that “[i]t is *now proper* for this amount *to be entered as a monetary judgment.*” (R. 8) (emphasis added). Accordingly, Borrowers have conceded that no money judgment was entered in July 2012, and that it was proper to enter the deficiency judgment in July 2015. (See also Init. Resp. Br. at 1, admitting that “the text of the foreclosure decree did not direct the entry of a money judgment against any Defendant.”). As a result, the 10-year period for enforcing the money judgment did not and could not commence until July 2015.

Throughout its Brief of Appellant, Lender argues that the courts strictly construe and enforce the “judgment” statutes at issue here, even if there are compelling facts making it inequitable to do so. (Init. App. Br. at 9-10 and 11-12, citing *Gordon v. Lancaster*, 823 S.E.2d 173, 175 & 176 (S.C. 2018) (addressing § 15-39-30), *rev’g* 795 S.E.2d 857 (S.C. App. 2016) and *overruling Linda Mc Co. v. Shore*, 703 S.E.2d 499 (S.C. 2010)). Lender also argues that the courts refuse to read one statute in a manner that makes a different

statute meaningless or superfluous. (Init. App. Br. at 10-11, citing *State v. Brown*, 873 S.E.2d 445, 456 (S.C. App. 2022) (legislature presumed to have intended to “accomplish something” in a statute, and a statute must not be read so that is “rendered surplusage, or superfluous”) and *State v Long*, 610 S.E.2d 809, 811-812 (S.C. 2005) (rejecting reading of one statute that would render another statute “virtually meaningless”), *aff’g* Op. No. 2003-UP-111 (S.C. Ct. App. filed Feb. 12, 2003). Borrowers fail to dispute or even mention these cases and the controlling statements of law made therein. (Init. Resp. Br., *passim*). This failure is the equivalent of failing to file a respondent’s brief, and this Court may therefore reverse on this basis. See Rule 208(a)(4), SCACR (“Upon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper.”).¹

In like manner, Lender specifically challenges the Master’s “title examiner” analysis and ruling on the existence of a money judgment. (Init. App. Br. 11, citing *Landry v. Landry*, 843 S.E.2d 491, 496 (S.C. 2020) and *Perry v. Bullock*, 761 S.E.2d 251, 252 (S.C. 2014). Borrowers do not dispute Lender’s arguments or cited cases – indeed, Borrowers never mention the “title examiner” issue at all. (Init. Resp. Br., *passim*). Again, therefore, this Court may reverse on this basis. See Rule 208(a)(4), SCACR.

II. The Foreclosure Decree was not a money judgment.

Borrowers admit that “the text of the foreclosure decree did not direct the entry of a money judgment against any Defendant.” (Init. Resp. Br. 1). More importantly, the Master made this same admission in the appealed order, and Borrowers do not dispute this ruling (making it the law of this case). (R. 1, stating that “the text of the foreclosure decree did not

¹ Borrowers make some “equity” arguments – these arguments have no merit. See Arg. IV, *infra*.

direct the entry of a money judgment against any Defendant.”). Borrowers, however, argue that Lender “should have made clear in the [Foreclosure Decree] that no personal money judgment was being sought at the time [but the Decree] simply did not make that clear.” (Init. Resp. Br. 2). The parties and the Master agree that the Foreclosure Decree did not direct the entry of a money judgment. It is nonsensical to argue that the Foreclosure Decree nevertheless had to state specifically that it was not doing something it did not do. Moreover, if the Borrowers viewed the Foreclosure Decree as “unclear” on this point (and it was not unclear), then Borrowers had to (but did not) make a post-trial motion to clarify any “unclear” portions of the decree. *Revis v. Barrett*, 467 S.E.2d 460, 463 (S.C. App. 1996), *citing Nellums v. Cousins*, 403 S.E.2d 681, 681-682 (S.C. App. 1991).

III. South Carolina Code Sections 29-3-650 and 29-3-660 establish alternative procedures for entering a deficiency money judgment in mortgage foreclosure proceedings.

As set forth in Lender’s Brief of Appellant, sections 29-3-650 and -660 establish two alternative procedures for entering money judgments in foreclosure actions. (Init. App. Br. 7-8, 10-11). Borrowers argue in response as follows:

[Borrowers] believe that the term "may" in both statutes (§29-3-650 and §29-3-660) did not intend to create two alternative means of dealing with a foreclosure. The term used by the legislature simply empowered the Court to so act (and to prevent any argument that the Court was without that power) rather giving the Court an alternative to act or not act as to entering a judgment.

(Init. Resp. Br. 2). Reluctantly, Lender admits that it does not understand this argument. The term “may” is permissive, not mandatory as Borrowers seem to argue. By stating a court “may” do one of the two things authorized in §§ 29-3-650 and -660, the General Assembly manifestly created two alternative procedures that a court may use in entering a money judgment in foreclosure actions. Contrary to Borrower’s apparent assertion, Lender

has not argued and does not argue that these code sections give the court the alternative of not entering a money judgment – rather, these statutes plainly grant the court two alternatives for doing so.

IV. Equity does not and cannot excuse the courts from strictly enforcing the “judgment” statutes.

As noted earlier, Borrowers do not address the case law that requires courts to enforce the “judgment” statutes strictly, even if there are compelling facts making it inequitable to do so. Borrowers nevertheless argue that equity should protect them from the actual date of entry of the deficiency judgment, because Lender could have sought the judgment sooner. This argument overlooks the cases requiring strict enforcement of the “judgment” statutes. Moreover, it overlooks the undisputed facts that Borrowers never claimed and never proved any mal-intent in not seeking entry of the judgment earlier, nor any particularized harm arising specifically from the absence of earlier entry. Finally, despite their protestations to the contrary, nothing in law or equity precluded Borrowers from seeking the entry of the deficiency judgment if they believed such was necessary to protect their interests.

V. Borrowers’ “additional sustaining ground” has no merit and, contrary to Borrowers’ arguments, the instructions on the Form 4 support Lender’s arguments.

Relying on an argument never presented to or ruled upon by the Master, nor made the subject of any motion to reconsider, Borrowers argue that Lender failed to follow the instructions for the Form 4 attached to the Foreclosure Decree, *i.e.*, Lender left the party and judgment amounts blank rather than putting “N/A” in those boxes. Borrowers cite paragraph 4 of the Form 4 Instructions sheet as supporting authority. Borrowers’ argument fails for two reasons.

First, Borrowers never explain how a “blank” box as opposed to an “N/A” box is outcome determinative here. Be it a “blank” box or an “N/A” box, the Form 4 manifestly could not and did not enter a money judgment absent the identification of the party against whom the money judgment was being entered and, more importantly, absent a statement of the amount of the money judgment being entered.

More importantly, Borrowers overlook and misperceive the instructions that relate directly to foreclosure decrees. Paragraph 10 of the instructions provides as follows with respect to foreclosure orders:

When an Order of Foreclosure is filed, *neither* the parties or debt owed *should be listed* in the Information for the Judgment Index Section, **unless** the foreclosure order *specifically* requires entry of the full judgment amount before the foreclosure sale, *pursuant to Section 29-3-650* of the SC Code.

(R. 77) (all emphasis added). Here, as admitted by Borrowers and found by the Master in the appealed order, the foreclosure order does not “specifically require[] entry of the full judgment amount before the foreclosure sale.” Notably, the reference to § 29-3-650 also demonstrates that sections -650 and -660 are different from each other. (See Args. I & II, *supra*). More importantly, Paragraph 11 of the instructions states as follows: “*If* the deficiency judgment is *waived* in a Foreclosure action, indicate N/A in the ‘Judgment Amount To Be Enrolled’ box.” (R. 77) (emphasis added). Here, Lender did not waive the deficiency so, contrary to Borrowers’ argument, putting “N/A” in the box as urged in their argument would have been erroneous. Had such been done, it would have created the erroneous impression that Lender had waived the deficiency.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Brief of Appellant, Lender respectfully submits that this Court should reverse the appealed order and remand the case for further proceedings.

Respectfully Submitted,

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The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.

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