

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

APPEAL FROM RICHLAND COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE JOSEPH M. STRICKLAND
RICHLAND COUNTY MASTER IN EQUITY

S.C. COURT OF APPEALS
Unpublished Opinion No. 2023-UP-315

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JAN 16 2024
SC Court of Appeals
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S.C. SUPREME COURT

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 South Carolina,

Appellant,

V.

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

Respondents

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

Petitioners

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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INTRODUCTION

This Petition requests that this Court issue a Writ of Certiorari to the South Carolina Court of Appeals to review its opinion in 2023-UP-0315.

The Appeal originated from the Order of the Honorable Joseph M. Strickland, Master in Equity finding that the Appellants' deficiency judgment had expired on July 23, 2022. The Appellants had waited three years to file the actual order determining the amount of the deficiency.

On appeal, the Appellants argued the language of §29-3-630, et seq., allows a mortgagee to wait an indefinite time before filing its Deficiency Judgment. The Appellants did not argue the application of Rule 59(e), nor can it be inferred from the argument that they were relying in any respect on the Rule.

The Court of Appeals reversed the Master by stating "If the parties took issue with the delay in enrollment of the judgment, their remedy at the time would have been to file a Rule 59(e), SCRCP, bring their concerns to the Court's attention." and then citing § 15-35-810.

The basis of the reversal was not raised to the Court by the Appellants.

The issues raised by the Appellants in their brief are novel issues which neither the Court of Appeals nor the Supreme Court have addressed.

The issues raised by the Petitioners concerning the disposition of the Appeal are also novel issues which have not been addressed by the Supreme Court.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion September 20, 2023. The Petition for rehearing was served and filed on October 5, 2023.

On November 2, 2023, the Court requested that the Appellants file a return to the Petition no later than ten days from the date of the letter.

The Appellants served and filed their return on November 10, 2023.

On December 14, 2023, the Court denied the petition for rehearing. This petition would be due on January 13, 2024, which is a Saturday. January 15, 2024, is a holiday. The Petition is therefore due on January 16, 2024, and is timely filed.

QUESTIONS PRESENTED

1. Did the Court of Appeals violate Rule 220(c), SCACR by reversing on a ground not argued the Appellant?
2. Did the Court of Appeals err in its reliance on Flexon v. PCH-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (Ct. App 2015)?
3. Did the Court of Appeals err in its reliance on Rule 59(e)?
4. Did the Court of Appeals violate Rule 220(b), SCACR in its reversal?

STATEMENT OF THE CASE

This is a commercial mortgage foreclosure action by the Appellant (Lender) against Rosewood and Twitty, (collectively referenced as Borrowers) that was referred to the Master in Equity (Master) for final judgment and direct appeal. On July 23, 2012, the Master entered his "Master's Report and Judgment of Foreclosure and Sale" (Foreclosure Decree) and thereafter sold the commercial property. (R. 14-25). He found that the "total debt" under both notes and mortgages was \$2,260,437.28 plus interest and that Lender "should have judgment of foreclosure of the mortgage and the mortgaged premises should be ordered sold at public auction." (R. 21-22, ¶¶ 30-31) (emphasis added). The Master ordered that Borrowers could avoid the foreclosure sale by paying off the "total debt" on or before the date of sale. (Id. at 23, ¶¶ 2-4). Upon their failure to do so, the Master would sell the property at public auction (id.) and, "if the proceeds of sale [were] insufficient to pay the [total debt], the [Lender] shall have a judgment for such deficiency against the [Borrowers] pursuant to [§ 29-3-660]." (Id. at 24, ¶ 8) (all emphasis added).

Neither party appealed the Foreclosure Decree, so the findings and rulings therein became the law of the case.

The Master sold the Property for \$488,547.00 in August 2012 and, because Lender sought a deficiency judgment against Borrowers, the bidding remained open for thirty (30) days until September 5, 2012. (R. 1)

On July 23 2015, the Master entered his "Order of Deficiency Judgment" (Deficiency Judgment) of \$1,887,190.18 on July 23, 2015, finding that "[i]t is now proper for this amount to be entered as a monetary judgment." ®. 8) (emphasis added). No one appealed the Deficiency Judgment against Borrowers for the mortgaged debt that remained after the

sale of the property. (R.8-13).

On October 14, 2022, the Master entered his "Order on Status of Judgment" (Order), ruling that the personal money judgment against Borrowers expired on July 23, 2022, because the ten-year statutory life of the personal money judgment commenced upon the entry of the Foreclosure Decree in 2012 rather than the subsequent entry of the Deficiency Judgment in 2015. (R. 1-7).

During the course of supplemental proceedings in August 2022, Borrowers asserted that the money judgment against them expired on July 23, 2022, ten years after the entry of the Foreclosure Decree. Lender asserted that the money judgment did not expire until July 23, 2025, ten years after the entry of Deficiency Judgment. The Master agreed with Borrowers and held that the money judgment expired on July 23, 2022. Lender appealed.

The Court of Appeals reversed the Master by stating "If the parties took issue with the delay in enrollment of the judgment, their remedy at the time would have been to file a Rule 59(e), SCRCP, bring their concerns to the Court's attention." and then citing § 15-35-810.

The basis of the reversal was not raised to the Court by the Appellants.

The Court of Appeals denied the Petition for Rehearing.

ARGUMENT

1. The Court of Appeals ignored its limited power under the Rules to deal with an appeal.

Rule 220 (c) states:

Affirmance on Any Ground Appearing in Record. The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.

There is no Rule which authorizes the Court of Appeals to reverse a judgment on grounds that were not argued by the Appellant.

As former Chief Judge Alex Sanders so aptly stated, "[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct.App.1991).

The Appellants did not in neither their Brief nor in their Reply Brief ever argue that

the failure to file a motion under Rule 59(e) in 2015 estopped the Respondents from raising the issue in 2022, which was ten years after the sale.

2. Reliance on Flexon v. PCH-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (S.C. App. 2015)

The Court's reliance on on Flexon v. PCH-Jasper, Inc. is misplaced.

The holding in that case is specifically limited to a challenge in a second appeal to a ruling made in the prior appeal. It does not establish a general rule of res judicata in all appeals.

This appeal is not at all similar to the issue in Flexon nor can the holding in Flexon be stretched to apply to the facts in this appeal.

3. Reliance on Rule 59(e), SCRPC.

Even if the Court of Appeals could reach outside the briefs to decide the case on Rule 59(e), that decision was in error.

Although the Court of Appeals found that the Appellants should have filed a motion under Rule 59(e), it is unclear how that might have been accomplished. First there was no hearing prior to the issuance of the Order. The Appellants had no opportunity to present an opposition prior to the Order being issued. One cannot raise matters in a motion under Rule 59 which had not been previously presented to the Court. Moreover, the question of when the judgment had expired was not ripe for consideration until July 23, 2022.

In short, the filing of the 2015 Order should not have been dispositive of the issue of when the start of the ten year period should start to run.

4. Disposition pursuant to Rule 220(b) SCACR

The Court of Appeal's opinion disposing of the appeal pursuant to Rule 220(b) was improper.

Rule 220(b) requires the Court to set forth the reasons for its disposition of the case. The Court failed to do so. Neither Rule 220(b), SCACR nor any other Appellate Court Rule gives the Court carte blanche to scour the Record looking for reasons to reverse the Trial Court.

CONCLUSION

For these reasons, the Petitioner prays for an Order granting a Writ of Certiorari to the Court of Appeals.



s/Spencer Andrew Syrett

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January 15, 2024

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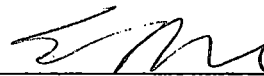
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PROOF OF SERVICE

I certify that I have served one copy of the Petitioner's Petition for Writ of Certiorari on the Appellant by depositing them in the United States Mail, postage prepaid, on January 15, 2024, addressed to its attorney of record, Robert L. Widener.

Burr and Forman, LLP
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