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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Circuit Court Judge

Supreme Court Appellate Case No. 2024-000067
Court of Appeals Unpublished Opinion No. 2023-UP-315
Court of Appeals Appellate Case No. 2022-001597
Court of Common Pleas 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,.....Respondent,

v.

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

Of Which Rosewood Holdings, LLC and D. Christopher Twitty are ..... Petitioners.

RESPONDENT'S RETURN TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

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INDEX

QUESTIONS PRESENTED

1. The Court of Appeals correctly ruled that the judgment was entered in 2015 under the language in the 2015 judgment itself and the requirements of S.C. Code Ann. § 15-35-810.

2. The Court of Appeals' ruling that the judgment was entered in 2015 is the law of this case, because the Petitioners did not challenge this ruling in their Rehearing Petition before the Court of Appeals, nor do they challenge in their Certiorari Petition before this Court.

3. Borrowers' grounds for certiorari have no merit.

4. The Court of Appeals did not reverse the appealed order based on the Petitioners' failure to file a Rule 59(e) motion.

5. The Court of Appeals did not reverse the appealed order based on a ground not argued to it.

6. The Petitioners could have made a Rule 59(e) motion in response to the 2015 order.

7. The Court of Appeals' unpublished opinion complies with Rule 220(b), SCACR.

8. The Petitioners did not appeal the 2012 or 2015 order, so both orders became the law of this case.

INTRODUCTION

This commercial mortgage foreclosure action resulted in a deficiency money judgment. The controlling issue is when was the money judgment entered such that its 10-year "life" commenced under S.C. Code § 15-35-810, upon entry of the foreclosure decree in 2012 or entry of the deficiency money judgment in 2015? The Court of Appeals correctly held the judgment was entered in 2015: "Based on the language in the July 2015 order – 'It is *now* proper for this amount to be entered as a monetary judgment' (emphasis added) – and the language of section 15-35-810(2005) of the South Carolina Code, we hold the judgment was entered in 2015." (Op. at 2) (Italics by Court, underlining added). The Petitioners did not challenge this ruling in their rehearing petition before the Court of Appeals. (Rhg. Pet., *passim*). Thus, it is the law of this case. *Mazloom v. Mazloom*, 709 S.E.2d 661, 661 (S.C. 2011); Rule 242(d)(2), SCACR.[1] Moreover, the Petitioners do not challenge this dispositive ruling on the controlling merits issue in their certiorari petition. (Cert. Pet., *passim*). Thus, it is the law of this case. *Moseley v. All Things Possible*, 719 S.E.2d 656, 658 n.4 (S.C. 2011); *South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 578 S.E.2d 8, 9 n.1 (S.C. 2003). This moots all other arguments made by the Petitioners. For this reason alone, this Court should deny certiorari.[2]

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[1] At the end of their Ground 3 for certiorari, the Petitioners assert the following: "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." (Cert. Pet., Grnd. 3 at 4). The Petitioners' purpose is unclear, given that they make this statement at the end of their erroneous procedural arguments about Rule 59(e) in Ground 3. (See Arg. II(A), *infra*). Moreover, no "Question Presented" mentions or avers any error in the Court of Appeals' ruling on the merits. (Cert. Pet. at 2). In any event, the Petitioners' conclusory assertion in a single sentence does not challenge the merits ruling with any particularity, discussion, supporting argument, or supporting authority. See Rule 242(d)(4), SCACR (certiorari petition shall include "A direct and concise argument in support of the petition [with] citation of authority and specific reference to pertinent portions of the Record on Appeal. Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition."); see also *First Sav. Bank v. McLean*, 444 S.E.2d 513, 514 (S.C. 1994) (mere assertion of error with no supporting argument or authority is an abandonment of the issue).

[2] Challenging the ruling in a Certiorari Reply would be futile – an issue cannot be raised for the first time on reply. *See McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011) (cannot raise issue for first time in a reply brief).

STATEMENT OF THE CASE

This is a commercial mortgage foreclosure action by the Respondent (Lender) against the Petitioners (Rosewood and Twitty, collectively Borrowers) that was referred to the Master in Equity (Master). Lender loaned Borrower Rosewood $1.65 Million Dollars in October 2006, taking back a note and a first-lien, purchase money mortgage from Rosewood on its commercial real property (the Property), together with a personal guarantee from Borrower Twitty. (R. 18, ¶¶ 8-10). In November 2007, Lender loaned Borrower Twitty $203,291.00, taking back a note from Twitty and a second mortgage from Rosewood on the Property. (Id. at 20, ¶¶ 20-23). Borrowers failed to make the required payments. (Id. at 19 and 21, ¶¶ 18 & 28). Lender sued Borrowers in March 2011, seeking foreclosure of both mortgages and a deficiency judgment for any amount remaining after the foreclosure of the mortgages and sale of the Property. (See id. at 24, ¶ 6).

The Master ruled in the July 23, 2012, Foreclosure Decree that the "total debt" under both mortgages was $2,260,437.28 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). Borrowers could avoid the sale by paying off the "total debt" on or before the date of sale. (Id. at 23, ¶¶ 2-4). If they failed to do so, the Master would sell the Property (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). Notably, the Form 4 for the Foreclosure Decree did not include a money judgment in any amount against any Borrower. (See Form 4 at R. 14; Reply Br. at Arg. V). Neither party appealed the Foreclosure Decree, so its findings and rulings became the law of the case.

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

2012. (R. 1). The Master issued his Report on Sale in January 2013 and thereafter entered his 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*." (R. 8) (emphasis added). No one appealed the Deficiency Judgment, so the findings and rulings therein became the law of the case.

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, holding that the money judgment expired on July 23, 2022, ten years after the filing of the Foreclosure Decree. Lender appealed, arguing the Master misapprehended and misapplied the relevant statutes, rules, and case law on the entry of money judgments and the commencement of a money judgment's ten-year "life" under § 15-35-810. (App. Br. 5-12; Reply Br. 2-6). The Court of Appeals reversed the Master in an unpublished opinion and later denied Borrowers' rehearing petition. Borrowers now seek a writ of certiorari from this Court to the Court of Appeals.

ARGUMENT

I. This Court should deny certiorari, because the Court of Appeals' ruling on the controlling merits issue is the law of this case that moots all arguments by Borrowers.

On the merits, the Court of Appeals held the judgment was entered in 2015: "Based on the language in the July 2015 order – 'It is *now* proper for this amount to be entered as a monetary judgment' (emphasis added) – and the language of section 15-35-810(2005) of the South Carolina Code, we hold the judgment was entered in 2015." (Op. at 2) (Italics by Court, underlining added). Borrowers did not challenge this ruling in their rehearing petition before the Court of Appeals, nor do they challenge it in their certiorari petition before this Court. (See Rhg. Pet. and Cert. Pet., both *passim*). Thus, the Court of Appeals' ruling is the law of this case and moots all arguments made

by Borrowers. *Moseley*, 719 S.E.2d at 658 n.4 (certiorari petition); *Mazloom*, 709 S.E.2d at 661 (rehearing petition); *S.E.C.U.R.E. Underwriters*, 578 S.E.2d at 9 n.1 (certiorari petition). For this reason alone, this Court should deny certiorari. (See also nn.1-2 and accompanying text, *supra*).

II. Borrowers' arguments for certiorari have no merit.

Borrowers list four (4) "Questions Presented" and make four (4) enumerated arguments in their certiorari petition. (Cert. Pet. at 2, 3-4). They present only one real argument, *to-wit*: that the Court of Appeals erred by reversing the Master on a ground never argued to the Court of Appeals, *i.e.*, Borrowers' failure to file a Rule 59(e) motion after the 2015 order. (*Id.*, *passim*). As noted earlier, the Court of Appeals' unchallenged ruling on the merits of this case moots all of this. In any event, as shown below, Borrowers' argument(s) have no merit.

A. Borrowers' Argument 3 has no merit.

Borrowers complained about the delay in entering the deficiency judgment. The Master rested the appealed order in part on this complaint. Lender appealed on several grounds (App. Br. 5-12), including the following:

> Moreover, Borrowers had the absolute right to seek an earlier entry of the deficiency judgment or object to the entry of the deficiency judgment if they believed the judgment should have been entered earlier to protect their interests. They did not, and they have not claimed or shown that Lender acted with any mal-intent in not earlier seeking entry of the deficiency judgment.

(App. Br. 11). Borrowers responded as follows:

> In view of the fact that the subsequent [deficiency judgment] order was issued without a hearing or notice to the borrowers prior to its entry, Borrowers were hardly in a position to seek the entry of a judgment earlier that (sic) it was entered.

(Resp. Br. 3).[3] The Court of Appeals noted the following:

[3] This argument is nonsensical. The fact that the order had not yet been entered did not prevent Borrowers from seeking an earlier entry. To the contrary, if Borrowers were concerned about delay, the fact that the order had not been entered was the reason for seeking an earlier entry.

> *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, bringing their concerns to the court's attention.

(Ct. App. Op. at 2) (emphasis added). Borrowers mis-describe and challenge this statement as a *sua sponte* reversal of the appealed order for failure to make a 59(e) motion:

> 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. (sic)" and then citing § 1535-810. [] The *basis* of the reversal was *not raised* to the Court *by the [Lender].*" [Cert. Pet., Statement of the Case, at 3 (emphasis added)].
>
> There is no Rule which authorizes the Court of Appeals to *reverse a judgment on grounds that were not argued by the Appellant*. . . . [Lender] did not in neither their (sic) Brief nor in their (sic) Reply Brief ever argue that the *failure to file a motion under Rule 59(e) in 2015 estopped the [Borrowers] from raising the issue in 2022*, which was ten years after the sale. [Cert. Pet., Arg. 1, at 3-4 (emphasis added)].
>
> 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 [deficiency judgment] Order. [Borrowers] had no opportunity to present an opposition prior to the [deficiency judgment] 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*. [Cert. Pet., Arg. 3 at 4 (emphasis added)].
>
> 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. [Cert. Pet., Arg. 4 at 4 (emphasis added).

It is true that, as a general rule, appellate courts may not reverse a trial court on grounds not argued to the appellate court. It is also true that Lender never argued that Borrowers' failure to make a Rule 59(e) motion in response to the 2015 Deficiency Judgment warranted reversal of the appealed order or estopped Borrowers from challenging the commencement date of the judgment's 10-year "life" under § § 1535-810. Every other part of Borrowers' argument is wrong.

The Court of Appeals did not reverse the appealed order on a "59(e) basis, nor did it find that Borrowers "should have filed a motion under Rule 59(e)." Rather, the Court simply and

correctly observed that, **if** Borrowers had some concern about the delay in entering the deficiency judgment, they *could have* raised it at that time with a 59(e) motion. The Court of Appeals never said that the failure to make a 59(e) motion "estopped the [Borrowers] from raising the issue in 2022," the issue being when the 10-year "life" of the judgment commenced. To the contrary, the Court simply ruled against Borrowers on the merits of this question, holding that the entry of the 2015 deficiency judgment commenced the 10-year "life" under § 15-35-810. And, as noted earlier, Borrowers have not challenged this adverse ruling on the merits, thereby making this ruling the law of the case that moots all arguments made by Borrowers in their certiorari petition.

Borrowers argue that they could not make a 59(e) motion for the following reasons: (1) the Master entered the 2015 order without holding a hearing; (2) Borrowers thus did not have an opportunity to raise their "delay" concerns; (3) a party cannot use a 59(e) motion to raise an issue for the first time; and (4) therefore, Borrowers could not make a 59(e) motion. Borrowers misapprehend South Carolina law on when a party may make a 59(e) motion.

The general rule is that "a party cannot use a Rule 59(e) motion to advance an issue the party *could have raised* to the circuit court prior to judgment, *but did not*." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 762 S.E.2d 693, 695 (S.C. 2014) (emphasis added) (citation omitted). As Borrowers correctly note, they "could [not] have raised" their delay issue prior to the entry of the 2015 order, but that simply meant that the prohibition in the general rule against "new" arguments did not apply to them. Rather, because they did not have the opportunity to raise their concerns prior to the entry of the 2015 order, they could have made a 59(e) motion after the order and raised their concerns. *Brown v. Odom*, 823 S.E.2d 183, 187-188 (S.C. App. 2018) (motion available to address issues that could not have been raised prior to trial, including when a court's order creates an issue); see also *Anderson County v. Preston*, 831 S.E.2d 911, 917 (S.C.

2019) (motion available when issue does not arise or become known until entry of court's order); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 392 (S.C. 1995) (motion available to object to not giving opposing counsel an opportunity to review proposed order before being signed by the court); *Stanley v. S. States Police Benevolent Ass'n*, 868 S.E.2d 412, 414 (S.C. App. 2014) (motion available when order contains relief that was not requested); *Miller v. Miller*, 652 S.E.2d 754, 763 (S.C. App. 2007) (motion available when there are inaccuracies in the order or inconsistencies with an oral ruling). Thus, Borrowers' argument has no merit.[4]

B. Borrowers' Argument 1 has no merit.

Borrowers correctly note that appellate courts generally cannot reverse a lower court on grounds not raised by the appellant to the appellate court. (Cert. Pet. 3). Borrowers argue that the Court of Appeals breached this rule by reversing the Master on a ground not argued to it, to-wit: Borrowers' failure to make a Rule 59(e) order after the filing of the 2015 Deficiency Judgment. (*Id.* at 3-4). That is not what happened as explained more fully in Argument II(A), *supra.*

C. Borrowers' Argument 2 has no merit.

Here, Borrowers attack the Court of Appeals' citation of *Flexon v. PCH-Jasper, Inc.*, 776 S.E.2d 397 (S.C. App. 2015), a case that applied the law of the case doctrine in a "subsequent appeal" scenario. (Cert. Pet. 4). Borrowers correctly note that this case does not involve a subsequent appeal, but they overstate the significance of this distinction.

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[4] At the end of their "59(e)" argument, Borrowers make a "ripeness" argument: "Moreover, the question of when the judgment had expired was not ripe for consideration until July 23, 2022. (Cert. Pet., Arg. 3 at 4). Ripeness of when the judgment expired has never been an issue in this case, and Lender does not understand this argument. The issue at hand was Borrowers' purported concern over the delay in the entry of the deficiency judgment, which became "ripe" upon entry of that judgment, thereby establishing the delay in its entry. At that time, Borrowers could have raised their concerns about delay, but they chose not to do so. Thus, their only recourse was to argue "judgment expiration" in response to Lender's collection efforts *i.e.*, an argument that hinged upon the merits question of when was the judgment entered such that its 10-year "life" commenced under § 15-35-810. As noted throughout this Return, Borrowers have not challenged the Court of Appeals' ruling on this merits issue, thereby making it the law of this case that moots all arguments made by Borrowers in their certiorari petition.

Lender argued that the unappealed 2015 Deficiency Judgment was the law of this case, including the ruling therein that "[i]t is now proper for this amount to be entered as a monetary judgment," because neither party appealed the Deficiency Judgment. (See App. Br. 4; Reply Br. 2). The Court of Appeals' citation to *Flexon* was a correct acceptance of this argument.

Notably, Borrowers concede in their Statement of the Case that no one appealed the 2012 Foreclosure Decree, and this lack of an appeal made it the law of this case. (Cert. Pet. at 2). They also concede that no one appealed the 2015 Deficiency Judgment. (Cert. Pet. 2-3). They never explain why the 2015 Deficiency Judgment is nevertheless not also the law of this case. The law fills this vacuum – the failure to appeal the 2015 Deficiency Judgment made it the law of this case. *Judy v. Martin*, 674 S.E.2d 151, 154 (S.C. 2009) (An "[a]ppellant may not seek relief from the prior unappealed order of the circuit court, because the order has become the law of the case.").

D. Borrowers' Argument 4 has no merit.

Borrowers argue that the Court of Appeals violated Rule 220(b), SCACR, by failing to "set forth the reasons for its disposition of the case." (Cert. Pet. 4). As shown above, the Court of Appeals opinion states the reasons for its decision, particularly its decision on the merits, which Borrowers do not challenge in their certiorari petition.[5] Moreover, the Court of Appeals' opinion meets the requirements and form approved by this Court in *In re Memorandum Decisions by Court of Appeals*, 471 S.E.2d 456 (S.C. 1993), where this Court described the essential requirements for a proper opinion as clearly stating how the case was decided and the reasons for that decision:

> It has formerly been deemed adequate for the opinion to show in any decisive way clearly how the case was decided, and the reasons therefore. . . . If the Court makes it clear what disposition has been made of the case, and the reasons for its action, nothing more is essential.

[5] Borrowers also argue that the appellate court rules do not give the Court of Appeals "carte blanche to scour the record" for reasons to reverse. (Cert. Pet. 4). This is another assertion that the Court of Appeals reversed for a reason not raised to it but, as shown earlier, that is not what the Court of Appeals did in this case.

Id. at 457 n.1. Here, the Court of Appeals' opinion clearly meets these requirements. Moreover, this Court further explained that a Court of Appeals opinion in the following format was sufficient:

> Per Curiam. Affirmed pursuant to Rule 220(b)(1), SCACR and the following authorities: Issue 1: *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989)(a party cannot argue one ground at trial and another on appeal); Issue 2: S.C. Code Ann. § 19-5-510 (1985); *Kershaw County DSS v. McCaskill*, 276 S.C. 360, 278 S.E.2d 771 (1981); *Peade v. Atlantic Coast Line Railway Co.*, 234 S.C. 140, 107 S.E.2d 15 (1959).

Id. The Court of Appeals' opinion in this case meets this requirement. Accordingly, Borrowers' Rule 220(b) argument has no merit.

In reaching its decisions, this Court applied S.C. Code Ann. § 14-8-250 regarding opinions by the Court of Appeals and S.C. Code Ann. § 18-9-280 regarding opinions by this Court. These statutes remain in effect and prevail in any conflict between them and the SCACR. S.C. Const. art. V, § 4 ("Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts."); *State v. Cottingham*, 77 S.E.2d 897, 900 (S.C. 1953) ("Statutes override rules of court, if in conflict."). Moreover, Rule 220(b) and (b)(2) § 14-8-250, and Rule 220(b)(1) restates § 18-9-280, so the analysis and result is the same, *i.e.*, the Court of Appeals' opinion in this case complies with the requirements of Rule 220(b), SCACR.

CONCLUSION

The Court of Appeals correctly reversed the Master on the merits arguments raised by Lender in its appeal. Borrowers did not mention or challenge this ruling in their rehearing petition before the Court of Appeals, nor do they do so in their certiorari petition before this Court. (Cert. Pet. and Rhg. Pet., both *passim*). Accordingly, this ruling is the law of this case that moots all arguments made by Borrower. For this reason alone, and for the other reasons set forth above, and for the reasons set forth in Lenders' Return to Petition for Rehearing and its Brief of Appellant and

Reply Brief in the Court of Appeals, which are incorporated herein, this Court should deny the Petition for a Writ of Certiorari to the Court of Appeals.

Respectfully Submitted,

/s/ Robert L. Widener

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