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Jun 19 2024

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, Master in Equity Court Judge

C.A. 2023-CP-40-00090
Appellate Case No: 2024-001011

Michael Gilbert a/k/a Michael L. Gilbert.....Appellant,

v.

Eastman Credit Union, Hammond School, Founders Federal Credit Union, Woodcreek Farms
Homeowners Association and South Carolina Department of Revenue..... Respondents,

**PETITION FOR FULL COURT REVIEW OF
ORDER DENYING WRIT OF SUPERSEDEAS**

Introduction and Background

Appellant/Petitioner Michael Gilbert a/k/a Michael L. Gilbert, by and through his undersigned counsel, Kenneth A. Davis, respectfully moves this Honorable Court pursuant to Rule 241(d) of the South Carolina Appellate Court Rules for a full court review of an order denying a Petition for Writ of Supersedeas issued on June 17, 2024. The petition sought an order staying the execution of the lower court's judgment of foreclosure in this case, which would include the execution of a writ of possession removing Petitioner from the subject property, pending resolution of the appeal in order to preserve the jurisdiction of the Court of Appeals and avoid the mootness of the appeal. In the alternative, the petition sought a hearing pursuant to S.C. Code Ann. § 18-9-170 to set the amount of the bond necessary for Petitioner to maintain possession of the subject property.

The underlying action is the foreclosure of a mortgage held by Respondent Eastman Credit Union. Petitioner is the property owner. Petitioner filed a Notice of Appeal on June 14, 2024, following the June 13, 2024 denial of a Motion to Set Aside Default by the Honorable Joseph Strickland, Richland County Master in Equity. The basis of the Motion to Set Aside relates to a deficiency in the underlying service of process necessary to confer personal jurisdiction on the trial court. Judge Strickland denied the Motion without a hearing.

In general, a judgment granting a mortgage foreclosure and sale is an exception to the automatic stay rule with respect to an appeal. See S.C. Code Ann. § 18-9-170. On June 17, 2024, Petitioner filed a Motion with the trial court pursuant to Rule 241(c) of the South Carolina Appellate Court Rules to stay the execution of the judgment, or in the alternative, to set a bond hearing pursuant to S.C. Code Ann. § 18-9-170. Judge Strickland denied the Motion without a hearing. Previously, on May 17, 2024, Judge Strickland issued a Writ of Possession, which was scheduled to be executed on June 17, 2024, at 1:00 pm.

1. There is an underlying appeal for which issuance of a Writ of Supersedeas would be proper.

Thereafter, Petitioner filed a Petition for Writ of Supersedeas on June 17, 2024, which was denied by a single judge. In denying the Petition for Writ of Supersedeas, the order of the single judge indicates that there was no underlying appeal filed as to the judgment of foreclosure, which was obtained by default. However, on June 14, 2024, Petitioner appealed the denial of a Motion to Set Aside the Default. The appeal of the denial of this motion does place the default judgment for foreclosure in the posture for an appeal.

2. Issuance of a Writ of Possession would moot an appeal in a way distinguishable from a mere sale.

Further, the order by the single judge cites a case, Wachesaw Plantation E. Cmty. Servs. Ass'n v. Alexander, 414 S.C. 355, for the proposition that the issuance of a foreclosure deed does not moot an appeal. However, this case is distinguished because it addresses the

issuance of a Writ of Possession, which was not addressed by the court in Wachesaw. Because possession would change, it is not likely that Petitioner would be able to recover possession of the property following a two -year appellate process, even if the appeal is successful.

3. **Denial of hearing to set the bond necessary to stay execution of a judgment is a direct statutory violation.**

Finally, the lower court denied the request for a hearing to set the bond required to stay execution of the judgment, when the underlying statute, S.C. Code Ann. § 18-9-170, does not appear self-executing. S.C. Code Ann. § 18-9-170 provides, in pertinent part, as follows:

If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which shall be specified in the undertaking. (emphasis added).

Accordingly, the statute requires a hearing to determine the bond amount necessary to stay execution of the judgment. The Supreme Court has stated that the process provided in S.C. Code Ann. § 18-9-170 is the appropriate remedy to stay execution of a judgment for foreclosure:

Since applications to stay proceedings of sale and delivery of possession of real property under decrees in foreclosure, appealed from, are frequently made to the members of this Court, for the information of the bar, we take the opportunity to say that hereafter such applications will be refused on the ground that proper relief may be had under the section of the Code to which we have referred.

Ex Parte Andrews, 152 S.C. 325, 150 S.E. 313 (1929). Thus, at the least, this matter should be remanded to the lower court to hold a hearing to set the bond amount.

WHEREFORE, Petitioner Michael Gilbert prays that this Honorable Court immediately grant a writ of supersedeas staying the execution of judgment in this case, including the sale and execution of the writ of possession, pending appeal in order to preserve the jurisdiction of the Court of Appeals and avoid the mootness of the appeal. In the alternative, Petitioner requests that the matter be remanded to the lower court to hold a hearing to set the bond amount. If the writ of possession has been executed, Petitioner requests that the Court's order requires return of possession of the property to Petitioner pending resolution of the appeal or the bond hearing, as applicable

Certificate of Ex Parte Request for Relief

Because of the pending Writ of Possession originally scheduled to be executed at 1:00 p.m. on June 17, 2024, there was no time to give notice because of the pending execution of the Writ.

Respectfully submitted,

BOYKIN & DAVIS, LLC

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June 19, 2024
Columbia, South Carolina

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VERIFICATION

I, Michael Gilbert, read the petition and affirmed that the facts are true.

FURTHER AFFIANT SAYETH NOT

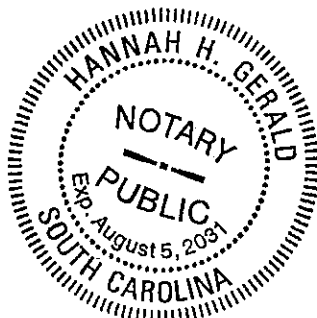
6-19-24
Date

[Signature]
Michael Gilbert

SWORN to before me this 19 day of

June, 2024.
Hannah H. Gerald

My Commission Expires: _____
My Commission Expires August 5, 2031



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PROOF OF SERVICE

I certify that I have served the Petition For Full Court Review of Order Denying Writ of
Supersedeas Notice of Appeal on the counselors of record listed below, by electronic mail and
U.S. Mail a copy of same on June 19, 2024, addressed to:

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Richland County Master-in-Equity
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June 19, 2024.

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