

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2013-001412

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OCT 02 2013
SC Court of Appeals

HSBC Bank USA, National Association, as
Trustee for MLCC 2007-2Respondent,

vs.

S. Russell Fielden; Deborah M. Fielden; and Coastal States
Bank.....Defendants,

Of whom

S. Russell Fielden and Deborah M. Fielden, are..... Appellants.

**RESPONDENT’S MOTION TO DISMISS APPEAL AND
MEMORANDUM OF LAW**

Respondent HSBC Bank USA, National Association, as Trustee for MLCC 2007-2 (“Respondent”) hereby moves to dismiss the appeal of S. Russell Fielden and Deborah M. Fielden (“Appellants”)¹ on the grounds that the appeal is moot.

This is an appeal from a Judgment of Foreclosure and Sale filed March 18, 2013 and subsequent Order Denying Defendants’ (Appellants) Motion to Reconsider filed on May 15, 2013. (See Exhibit A and B attached hereto). Respondent filed this foreclosure

¹ Appellants were represented by attorneys William H. Sloan, Esquire, James O. Scheider, Jr., Esquire and Robert Vaux, Esquire (Appellants’ Counsel) at various stages of the trial of this case. Pursuant to Orders issued by the South Carolina Court of Appeals filed on August 8, 2013, Appellants Counsel was relieved as counsel for Appellants.

action on June 14, 2010, and demanded a deficiency judgment against the Appellants. (See Exhibit C attached hereto). Appellants filed an Answer and Counterclaim on or about November 24, 2010. (See Exhibit D attached hereto). A final hearing in the matter was held on February 18, 2013. After hearing all of the arguments and weighing all of the evidence including testimony from Appellant S. Russell Fielden, the Master in Equity ruled that Respondent was entitled to foreclose on the subject property and further ordered that the property be sold. The Judgment of Foreclosure and Sale was entered on March 18, 2013. The judicial sale of the property was set for the sales date, May 6, 2013. Following the initial sales date of May 6, 2013, the sale was to remain open for an additional thirty (30) days to allow for upset bids, pursuant to Respondent's demand for a deficiency judgment.

On March 20, 2013, Appellants filed a Motion to Reconsider or, in the Alternative Alter Judgment. (See Exhibit E attached hereto). A hearing on Appellants' Motion was held on April 15, 2013. Pursuant to Rule 62(b) of the South Carolina Rules of Civil Procedure, the filing of a Rule 59(e) Motion to Reconsider does not automatically stay the enforcement of the judgment. As a result, Counsel for the Respondent notified counsel for the Appellants and the Master in Equity that Respondent would proceed with the sale on May 6, 2013, unless the court issued a stay. (See Exhibit F, Transcript of April 15, 2013 Hearing attached hereto, page 36, line 15 to page 37, line 1). Following the arguments of counsel, the Master in Equity took the matter under advisement, but did not issue a stay of the sale pending his ruling. Counsel for the Appellants did not make a motion to stay the sale or otherwise inquire as to the appropriate bond amount pursuant to S.C.Code Ann. §18-9-170 (1976).

Thereafter, on May 15, 2013, the Master in Equity entered an Order Denying Defendants' Motion to Reconsider. In the interim, the judicial sale of the property occurred on May 6, 2013. The sale became final on June 5, 2013, pursuant to statute, as no upset bids were received by the Master in Equity. The Respondent was the successful purchaser of the subject property for a sum of \$629,091.67, and a Foreclosure Master In Equity Deed was subsequently issued to the Respondent. (See Exhibits G and H attached hereto). Respondent released its right to a deficiency judgment because the successful purchase of the subject property left a minimal deficiency judgment to collect. Respondent released this deficiency judgment because it now owns the property and has the opportunity to recover its losses through a subsequent sale of the subject property.

It was only after the sale was final, on June 18, 2013, did counsel for the Respondent receive the *pro se* Notice of Appeal of the Appellants. Appellants did not seek to stay the sale by posting of a bond, pursuant to S.C.Code Ann. §18-9-170 (1976), prior to the finality of the judicial sale. Nor did Appellants petition the lower court for an emergency stay or other relief to prevent the final sale of the subject property. Instead, Appellants waited until the sale was final to appeal the lower court rulings.

When a judgment can have no practical legal effect upon the existing controversy, such that it is impossible for the reviewing court to grant effectual relief, a case becomes moot. Mathis v. S.C. State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). In the present case, Appellants seek to have the Order of Foreclosure and Sale reversed and the judicial sale vacated. The Order of Foreclosure and Sale has already been carried out and the property has been properly sold by the Master in Equity. Appellants did not take any action to stay the lower court case and/or seek to prevent the

judicial sale from becoming final, nor did Appellants post a bond to stay the judicial sale. As a result, the subject property has now been sold to Respondent and Respondent has taken actions based upon the valid sale.

Public policy generally requires that the validity of judicial sales be upheld and good faith purchasers should remain unaffected by irregularities in proceedings or error in the judgment. Cumbie v. Newberry, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968). Thus, where a valid judicial sale has occurred, it should not be disturbed, and any appeal of the underlying foreclosure action can have no practical legal effect.

Therefore, because Appellants' property has already been sold and that sale cannot be rescinded, Appellants are unable to obtain the requested relief. Without an available remedy, appeal of this case is moot. As such, Respondent respectfully requests this Court to dismiss the appeal and order that the Lis Pendens filed by Appellants S. Russell Fielden and Deborah M. Fielden be canceled.

Respectfully submitted,

October 1, 2013



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Of whom

S. Russell Fielden and Deborah M. Fielden, are..... Appellants.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **RESPONDENT'S MOTION TO DISMISS APPEAL AND MEMORANDUM OF LAW** on Appellants Russell Fielden and Deborah M. Fielden and other Defendants by depositing copies of it in the United States Mail, postage prepaid, on October 1, 2013, at the addresses shown on the attachment listing Other Counsel of Record and Parties.

October 1, 2013



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LICENSED IN SOUTH CAROLINA



October 1, 2013

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals Clerk of Court
1015 Sumter Street
Columbia, South Carolina 29201

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SC Court of Appeals

RE: HSBC Bank USA, National Association, as Trustee for MLCC 2007-2 v. S. Russell Fielden; Deborah M. Fielden; CoastalStates Bank AND Coastal State Bank v. S. Russell Fielden and Deborah M. Fielden
Appellate Case # 2013-001412
Civil Action# 2010-CP-07-2927
Our File # 511227.448

Dear Ms. Kitchings:

Enclosed are the original and six (6) copies of the Respondent's Motion to Dismiss Appeal and Memorandum of Law, along with a Proof of Service. Please return a filed copy of the document to me in the enclosed self-addressed, postage pre-paid envelope provided for your convenience. Also included is my firm's check for \$25 representing the filing fee.

By copy of this letter, I am serving a copy of the Respondent's Motion to Dismiss Appeal and Memorandum of Law and Proof of Service on all parties to this appeal.

Thank you for your assistance in this matter.

With kind personal regards, I am

Sincerely yours,

A handwritten signature in black ink, appearing to read "Charles S. Gwynne Jr.", written over a horizontal line.

Charles S. Gwynne Jr.

/mt
Enclosures as stated

cc:

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