

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
 INRE:)
 JP Morgan Chase Bank, National Association,)
)
 Plaintiff,)
)
 vs.)
)
 Florinda Ravenel, Household Finance)
 Corporation, II,)
)
 Defendants, and)
)
 Waypointe, LLC, Third Party Bidder)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2012-CP-18-0376

ORDER

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 DORCHESTER COUNTY

This matter is before the Court on the Plaintiff's Motion to Set Aside Foreclosure Sale of August 6, 2013 and Stay the Issuance of a Master's Deed and For an Expedited Hearing, filed August 21, 2013 (the Motion). On August 6, 2013, this Court conducted the judicial sale of real property,¹ the subject of the underlying foreclosure suit, pursuant to a Judgment of Foreclosure and Sale entered May 20, 2013, by the Honorable Maité Murphy (the JFS). On that same date,

¹ All that lot, piece or parcel of land with improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, known and designated as Lot 13, Block E, Oakmont Subdivision, as shown on a plat of Sigma Engineers, Inc., dated August 1, 1975, entitled, "A Plat Showing Block "E", Lots 13-17, Oakmont Subdivision, Dorchester County, S.C.," said plat recorded August 11, 1975, in Plat Book 22, Page 133, in the RMC Office for Dorchester County, SC; said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

This being the same property conveyed to Florinda Ravenel by deed of Joseph Gregory Renn and Samantha Leigh Renn dated January 14, 2005 and recorded January 28, 2005 in Book 4528 at Page 47.

Property Address: 113 Pinewood Street, Ladson, SC 29456

TMS# 154-14-01-003

See, ¶ 37, Judgment of Foreclosure and Sale (May 20, 2013).

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Judge Murphy issued a Notice of Sale for August 6, 2013, the first Tuesday of the month, the judicial sales date in Dorchester County.² The Notice of Sale was published for three consecutive weeks in the Summerville Journal Scene, a newspaper of general circulation in Dorchester County.

On August 6, 2013, this Court sold the real property at the judicial sale to the Third Party Bidder, Waypointe, LLC, a South Carolina limited liability company (Waypointe), for \$10,000.00. Waypointe, the high bidder amongst competitive bidders, posted the 5% deposit on the day of the sale, and complied with the bid on August 8, 2013. This Court confirmed the sale and issued its deed on that same day to Waypointe, LLC, who had the deed recorded in the RMC/ROD for Dorchester County.

Plaintiff filed its Motion August 21, 2013. The Court scheduled the merits of Plaintiff's Motion for September 3, 2013. The parties consented to a continuance, and the matter was scheduled for hearing on September 13, 2013. On September 3, 2013, the Plaintiff noticed an amended Motion, serving Waypointe's counsel. Notice of the hearing on the Motion, as amended, is not contested. On September 13, 2013, this Court heard the Motion (hereinafter Motion refers to the Motion, as amended). Both the Plaintiff and Waypointe submitted affidavits in support of their respective positions on the Motion. The Plaintiff's Motion, as amended, includes a Memorandum of Law. Waypointe submitted a Memorandum in Opposition to the Motion.³

² Dorchester County conducts Judicial Sales on the 1st Tuesday of each month.

³ At the Court's request both parties submitted memoranda on two other issues: applicability of federal preemption as to ground number 2, and Waypointe's right to attorneys fees.

Plaintiff raises four grounds, on which, the sale of the property to Waypointe should be set aside:

- (1) that an agent for the Plaintiff did not appear at the sale as required by the JFS;
- (2) that the Plaintiff failed to submit an appraisal of the property to the Veteran's Authority (VA), which it alleges is required by federal law;
- (3) that this court committed a clerical error in not continuing the August 6th sale; and
- (4) inadequacy of the price of the sale.

The following guides the Court's decision: "... the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court. *Investors Sav. Bank v. Phelps*, 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct.App.1990) (citing *Bonney v. Granger*, 300 S.C. 362, 387 S.E.2d 720 (Ct.App.1990)). The review of a judicial sale is equitable in nature and within the discretion of the trial court. *Fed. Nat'l Mortgage Ass'n v. Brooks*, 304 S.C. 506, 512, 405 S.E.2d 604, 607 (Ct.App.1991) (citing *Spillers v. Clay*, 233 S.C. 99, 102, 103 S.E.2d 759, 760 (1958)) *E. Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (Ct. App. 2007); see also, *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 662 S.E.2d 424 (Ct. App. 2008), as distinguished in *Arrow Bonding Co. v. Warren*, 399 S.C. 603, 609, 732 S.E.2d 622, 625 (2012). This Court denies the Plaintiff's Motion. The Court explains its ruling with the following.

(1) Plaintiff's Alleged Failure to Appear

Plaintiff's primarily contends no agent appeared on its behalf at the sale. Thus, one of the terms and conditions of the sale was not met. Hence, the sale should be set aside. Specifically,

Plaintiff argues that paragraph 28⁴ of the JFS requires that an agent of the Plaintiff is to be present at the time of the sale of the property. If no agent is present, the property should be withdrawn from the sale, and sold at the next available sales date. Waypointe stipulated that the sale of the property is governed, among other things, by the terms of the JFS. However, Waypointe argues, and this Court agrees, the sale of the property to Waypointe by this Court on August 6, 2013 complied with all terms of the JFS including paragraph 28.

When the Court offered the property for sale the Plaintiff's Bidding Agent, Ms. Hesselstine, stated she had "no bidding instructions." She made a representation to the Court on behalf of the Plaintiff *a fortiori* she was present as agent for the Plaintiff. The Bidding Agent did not disavow she was not present as an agent for the Plaintiff. In order to accept the Plaintiff's contention one must unreasonably stretch an inference that the bidding agent's statement, "I have no bidding instructions," meant that she was not at the sale on behalf of the Plaintiff. However, this imaginative inference is not reasonable when the Bidding Agent told the Court she had no bidding instructions. Her presence coupled with the statement satisfied the term and condition of the sale that required an agent of the Plaintiff to be present.⁵ Moreover, nothing in the JFS

⁴ "28. In the event an agent of Plaintiff does not appear at the time of sale, the within property shall be withdrawn from sale and sold at the next available sales date upon the same terms and conditions as set forth in this Judgment of Foreclosure and Sale or such terms as may be set forth in a supplemental order."

⁵ Fed. Nat. Mortgage Ass'n, *supra*, is instructive. The Court affirmed the Special Referee's Order Vacating the Sale. In that case, the Court notes, "[T]he irregularities involved here are not insubstantial." In that case the Court of Appeals recites these facts,

The foreclosure referee ordered the property advertised and sold by himself at public auction. The referee then, according to custom in the county, permitted the clerk of court to advertise and sell the property at auction.

To complicate matters more, the foreclosure referee, a local attorney, was retained by FNMA prior to sale to bid on the property at the foreclosure sale. He was authorized to bid up to \$27,500, the amount of the second mortgage plus costs and expenses. On the morning of the foreclosure sale, the foreclosure referee's son fell ill and he was unable to attend the sale. The referee then called his law partner to bid on the property. However, due to a mix-up in instructions, the law partner failed to enter a bid on the subject property.

suggests or infers that a statement made before the Court that the Bidding Agent has no bidding

These facts have morphed, and in large part shaped by the foreclosure plaintiffs' bar, who prepares proposed default foreclosure orders, into non-lawyer agents appearing for the plaintiffs at judicial sales. The Plaintiff who authorizes its attorney to hire a non-lawyer agent to appear at the judicial sale in this Court's view takes the risk that the bidding agent will fail to properly bid or unwittingly enter a no bid for the Plaintiff. The latter is what happened in this case. This Court believes the non-lawyer bidding agent, who appears without written authority to bid on behalf of the Plaintiff, creates unnecessary risks for the Plaintiff, its counsel, the Court, and the bidding public. Moreover, as the selling officer, this Court is asked to rely on a non-lawyer, as in the instant case without written authority – "the badge of authority," to accept a bid as valid on behalf of the Plaintiff. The equal solemnity doctrine requires the formality of an agent's authority must match the formality required by law for the enforceability of an act performed by an agent on behalf of its principal. See, *Wallace v. Langston*, 52 S.C. 133, 29 S.E. 552, 557 (1898), the Circuit Court's decision was affirmed and reported with the opinion of the Court written by Chief Justice McIver. The Circuit provides a litany of early common law on this point; including, "[the principal] could not, however, bind themselves by so solemn a paper as a deed or mortgage without giving to the agent a paper of equal solemnity, duly executed under their corporate seals. Citing, *Miller v. Ford*, 4 Strob. 215, 216, and, in part Chief Justice McIver, affirming the circuit court's opinion which at page 557-8, summarizes the case law with this:

In every case the alleged agent's intention to bind the principal must appear in the writing; if not, the principal is not bound. The principal cannot be reached by the holder of the papers. This is absolutely so in a court of law. If there be an exception to the rule, it can only be in that class of cases where, from the principal having taken the benefit, he may be followed in a court of equity; and in that class of cases his being held liable in a court of equity in no way relieves the agent from liability upon the paper itself. (4) In deeds and mortgages, for obvious reasons, the intention to bind some one else must appear in the manner of execution, whilst in less solemnly executed instruments it is sufficient if it can be made to appear from the whole paper. *Webster v. Brown*, 2 S. C. 430; *De Walt v. Kinard*, 19 S. C. 292; *Johnson v. Johnson*, 27 S. C. 316, 3 S. E. 606; *Moss v. Johnson*, 36 S.C. 553, 554, 15 S. E. 709; *Henshall v. Roberts*, 5 East, 150.

Plaintiff's counsel places the Court, as the selling officer, at risk of accepting a bid that is unauthorized, hence, unenforceable as against the principal while subjecting the agent to personal responsibility for its act. At least, were the Plaintiff's counsel present at the sale, he comes with his inherent and reliable credentials as an officer of the court. In short, the use of non-lawyer bidding agents as a practice is fertile ground for mistakes, and even worse potential improprieties in the conduct of the judicial sale. Cf. "[I]t is the long-established policy in South Carolina that "[t]he courts should be particularly jealous of the integrity of judicial sales." *In re Wilson*, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927). "[A]ny conduct on the part of those actively engaged in the selling or bidding [at a judicial sale] that tends to prevent a fair, free, open sale, or stifle or suppress free competition among bidders, is contrary to public policy [.]" *Ex parte Keller*, supra, 19, *Ex parte Johnson*, supra, 890. The Plaintiff's appearance by its counsel is the better practice. Plaintiff's appearance, without counsel, may be acceptable but is less than a better practice. In any event, the judicial sale is the *sine qua non* of the foreclosure process unless it is incorrectly used as an overreaching tool curtailing loss mitigation (dual tracking is inappropriate, see, Chief Justice Toal's Order, *In re Mortgage Foreclosure Actions*, 396 S.C. 209, 210, 720 S.E.2d 908 (2011),

The courts have reported that these failures (failed or delayed loss mitigation efforts between lender-servicers and mortgagor-debtors) are the result of a breakdown of loss mitigation efforts that all parties find to be in their best interests, if possible. The trial courts report that such breakdowns are largely the result of difficulty in communication between lender-servicers and debtors, and the fact that foreclosure actions are proceeding to conclusion without regard to ongoing loss mitigation efforts by the parties.

I further take judicial notice of the actions of courts in other jurisdictions describing a similar breakdown in the efforts of parties to foreclosure actions to reach a resolution of defaults in payment of mortgage loans).

Plaintiff's failure to appear with counsel cedes that the substantive judicial remedy, afforded by the Court, is less important than the substantive process and law. When these factors are not in alignment, then lawyers and the Courts are brought into disrepute.

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instructions means that the Plaintiff is not present, or that the Agent is not present on behalf of the Plaintiff.

The reasonable interpretation is that the Agent is present on behalf of the Plaintiff, however, the Plaintiff is not bidding. In fact paragraph 27 of the JFS states, in part: "Plaintiff or any other party to this action may become a purchaser at such sale." This is in accord with SCRCF 71(b), which provides in part: "The plaintiff or any other party may be a purchaser on such sale." This conditional language allows for the Plaintiff to bid but does not require the Plaintiff to bid. The mental gymnastics of the following: because the Bidding Agent did not have bidding instructions, then the Bidding Agent could not be present at the sale for Plaintiff is unreasonable. See, Kirby J. Flodin's Affidavit.

(2) Plaintiff's Failure to Submit Appraisal to VA⁶

Plaintiff next argues that it failed to submit an appraisal to VA as required by 38 U.S.C. 3732(c) and 38 C.F.R. §36.4322, and therefore this court's sale of the property to Waypointe should be set aside.⁷ The Plaintiff did not join the VA as a party, which is not prohibited by

⁶ The Court requested the parties to brief the issue of whether the VA regulations preempt this state's foreclosure procedure. VA guaranty loan regulations are found at 38 C.F.R. §36.4300, *et. seq.* The VA publishes regulations in the Federal Register and has extensive materials available for the public to view on the VA web site: <http://www.benefits.va.gov/homeloans>. The specific regulation Plaintiff cites actually embraces state court procedures for mortgage foreclosure by establishing reasonable timelines for loan termination. 38 C.F.R. § 36.4322 (a) provides, in part, "The Secretary will review such timeframes annually and, as the Secretary deems necessary, publish in the Federal Register a table setting forth the timeframes and methods the Secretary determines to be reasonable. The schedule will reflect the timeframe allowed for the standard, acceptable method for foreclosure proceedings in each State. (the Court's emphasis) Thus, the VA cedes to state court foreclosure proceedings to assign loan termination timelines for servicers. Moreover, Plaintiff candidly admits its research did not reveal any specific case wherein the VA's regulations have been found to pre-empt state foreclosure procedures. In short, the regulations govern the mortgagee's guaranty, the contractual relationship between mortgagee and the VA. .

⁷ Plaintiff's Amended Motion states: "Further, no appraisal of the real property had been obtained by the August 6 sale, and federal law and regulations of the Department of Veterans Affairs require holders of notes secured by mortgages on real property such as this to obtain an appraisal of the real property before the real property is sold at a judicial sale. See 38 U.S.C. 3732(c); and 38 C.F.R. §36.4322." [Court's emphasis]. 38 U.S.C. 3732(c) does not

these regulations, nor does the complaint assert allegations concerning the guaranty. The complaint does not seek the remedy of a judicial sale conditioned upon a VA appraisal. Moreover, Plaintiff failed to file any motion to amend or otherwise assert that the Plaintiff must procure a VA appraisal before the property could be sold at judicial sale. Thus, the failure to obtain an appraisal, if one was necessary, in accord with 38 C.F.R. §36.4300, *et. seq.* has no bearing on the sale conducted by this Court on August 6, 2013.

Waypointe argues that to allow the VA regulations to alter the sale would, in effect, retroactively amend the JFS. This Court agrees. See, *Fed. Nat. Mortgage Ass'n*, *supra*, at 607 which holds “a deviation from the terms of the foreclosure decree by the clerk of court was ineffective to extend the time for payment of the bid and thus Brooks’[the successful Bidder’s] failure to pay the amount of his bid into court within twenty days as required by the decree deprived him of standing to complain of the trial judge’s setting aside the sale.” *Fed. Nat’l*

make obtaining an appraisal mandatory. 38 C.F.R. §36.4322 (b)(1), provides: “At least 30 days prior to the scheduled or anticipated date of the liquidation sale, the holder must request that VA assign an appraiser to conduct a liquidation appraisal.” This, however, is conditioned on. 38 C.F.R. §36.4322 (a) which provides, in part, “For purposes of this part, a holder, using reasonable diligence must complete a foreclosure within the timeframe and in the manner determined by the Secretary. Nothing in the affidavits of the Plaintiff establishes the Plaintiff foundation for reliance upon 38 C.F.R. §36.4322. The record does not aid the Plaintiff either. The interest began accruing on April 1, 2011. Plaintiff filed its suit January 30, 2012 well over 180 days after the interest began to accrue. See, 36.4822 Loan Termination Loan Guaranty: Loan Servicing and Claims Procedures Modifications, 73 FR 6294-01. Moreover, a review of the VA loan guaranty program reveals no fatal defect in the guaranty claims process for failure to obtain the appraisal. 38 C.F.R. §36.4300, *et. seq.* inasmuch as 38 C.F.R. § 36.4324(e), states: “In the event that VA does not approve payment of any item submitted under a guaranty claim, VA shall notify the holder electronically what items are being denied and the reasons for such denial. The holder may, within 30 days after the date of such denial notification, submit an electronic request to VA that one or more items that were denied be reconsidered. The holder must present any additional information justifying payment of items denied.”

Mortgage Ass'n, cites *Ex Parte Keller*, 185 S.C. 283, 194 S.E. 15 (1937)) and quotes from it the following:

The respondent [successful bidder] ... was charged with notice of the terms of the decree of sale, and the master had no authority to vary these terms. As was stated in *Parrott v. Dickson*, 151 S.C. 114, 148 S.E. 704, 706 [63 A.L.R. 965]: 'The order of sale was the chart which guided the clerk of court in making the sales therein ordered. * * * The order of sale was a public document, and all bidders, as well as other persons, were charged with notice of its terms.' "

"Again in *Calder v. Maxwell*, 99 S.C. 115, 82 S.E. 997, a case involving a judicial sale, Mr. Justice Gage, speaking for the court, says: 'The order of the court is the blazed way for the officer to follow, and no other.' "

This Court's conduct of the sale was proper⁸. Moreover, Plaintiff fails to establish a foundation that the VA guaranty is available to this Plaintiff, and if available, that the guaranty is in anywise extinguished. The Plaintiff's failure to submit an appraisal to the VA is not a cogent reason, much less a fundamental defect in the foreclosure sale, to set aside this sale.

(3) Alleged Clerical Error by This Court

Plaintiff's counsel argues the Court failed to continue the sale on Plaintiff's request.

Plaintiff maintains its counsel sent an email to the Court withdrawing the property from the sale.

⁸ Waypointe in its Reply Brief makes an interesting observation, "in practice, the line between the selling and judicial functions has been blurred because the master may now serve in both capacities. Nevertheless, there is a line; when the master acts in a ministerial capacity as the arm of the court to sell the property, he may not act in his judicial capacity and may not alter the terms of the order." Cf., however, § 14-11-15 South Carolina Code, as amended, "The equity court is considered a division of the circuit court, and the master-in-equity, as judge of the equity court, is entitled to all the benefits and subject to all the requirements of the South Carolina Bar and the rules of the Supreme Court in the same respect as circuit court and family court judges. This section may not be construed as providing retirement for masters-in-equity under the provisions of Chapter 8 of Title 9." And SCRCP 71 (b) in part states: "The judgment shall direct that the mortgaged premises (or part thereof as required to satisfy the claims established) be sold by or under direction of the master or, in counties where there is no master, other appropriate court officer. In Dorchester County this Court conducted the sale. The Court may direct an appropriate court officer to conduct the Sale under its direction. Moreover, the JFS directed this Court to sell the property. Alternatively, the JFS provides "or other court-appointed or designated agent or auctioneer" to conduct the sale. The point is this Court when selling the foreclosed property is acting in its judicial capacity. When another is directed to sell that person is acting in ministerial capacity for the Court and is not acting in a judicial capacity (the Court's emphasis).

The Plaintiff submits two affidavits: (1) an affidavit by Reginald P. Corley, Esquire, one of Plaintiff's attorneys, and (2) an affidavit from the Network Administrator for the Information Technology Department of Plaintiff's counsel. In sum, Mr. Corley says because he had asked the sale to be cancelled his firm didn't hire anyone to appear at the sale. He also submits evidence of the property value. The Network Administrator's affidavit asserts that Plaintiff's counsel notified the Court to withdraw the sale, that the email sent by a former employee of the Plaintiff's counsel to an address given to it as the Court's address did not 'bounce', and therefore the Court had received a request to withdraw the sale of the property. See, Affidavit of Brian Scott Olliff.

Waypointe argues whether the email was received or not is immaterial. It argues the unilateral request by email of Plaintiff's Counsel is insufficient under the South Carolina Rules of Civil Procedure. Waypointe reasons the Court ordered the sale of the property in its May 20, 2013 order. Specifically, paragraphs 24 and 27 of the May 20, 2013 order of sale allows for this court to determine the day of the sale. Judge Murphy issued a Notice of Sale for August 6, 2013. The Plaintiff, at the Court's request, advertised the Notice as previously stated.⁹ Moreover,

⁹ Plaintiff's attorneys fee affidavit states:

Ultimately, my fellow counsel, our staff, and I have been responsible for the preparation of the following pleadings and other documents in this case:

1. Lis Pendens and any amendment thereto
2. Summons and Complaint and any amendment thereto
3. Notice of Foreclosure Intervention and any other required documents pursuant to South Carolina Administrative Order 2011-05-02-01
4. Affidavits and proposed Orders for publication
5. Affidavit of Default
6. Consent(s) to Order of Reference
7. Order of Reference
8. Notice(s) of Hearing
9. Record of Hearing
10. Proposed Judgment of Foreclosure and Sale
11. Notice of Sale

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nothing in the order provides or permits the Plaintiff to unilaterally continue the sale via email or otherwise. Waypointe cites SCRCP 7(b), which provides:

An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be in writing, shall state with particularity the grounds thereof, and shall set forth the relief or order sought.

Waypointe simply argues the Plaintiff, seeking to modify an order of this court, should have filed a motion to continue the sale setting forth its grounds, thereby, putting the court on notice and making it part of the public record. This court agrees.

The SCRCP are designed to provide the Courts and parties appearing before the Courts an orderly means by which the civil courts can do justice. The Rules are not inflexible but are designed, and the Court is required, to construe all pleadings to do substantial justice to all.

In Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 25-26, 410 S.E.2d 18, 20 (S.C. Ct. App. 1991), a mortgagee by petition alleged the mortgagor's federal bankruptcy proceeding had been dismissed and sought a rule to show cause why the pending foreclosure sale should not go forward. The petition also asked the master to amend the foreclosure order to permit the mortgagee to seek a deficiency judgment against the mortgagor and another party in

Additionally, we have been responsible for preparing and serving the pleadings upon each defendant personally or by statutory/substitute service; obtaining reinstatement and payoff figures and payment histories (if requested or required); and scheduling and attending the hearing in this matter. Our responsibilities after today include sending copies of the notice of the entry of judgment to appearing defendants, obtaining bidding instructions from Plaintiff or its designee, representing Plaintiff at the sale or arranging for such representation, preparing an Order of Sale or Report on Sale and Disbursements and Order Confirming Sale, and preparing the Foreclosure Deed and any other documents necessary in this particular action (Court's emphasis).

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the event the proceeds of the foreclosure sale were not sufficient to satisfy the judgment debt.

Judge Bell¹⁰ succinctly addresses the South Carolina Rules of Civil Procedure:

Rule 1, S.C.R.Civ.P., provides the Rules of Civil Procedure govern procedure in all South Carolina courts in all suits of a civil nature. Rule 1 further directs the Rules shall be construed to secure the just, speedy, and inexpensive determination of every action. Rule 61, S.C.R.Civ.P., mandates: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Rule 7(b), S.C.R.Civ.P., provides an application to the court for an order shall be by written motion. Rule 8(f), S.C.R.Civ.P., requires all pleadings to be so construed as to do substantial justice to all parties.

This Court notes that Judge Bell is addressing an issue raised by a petition. In the present case, the mistake that the Plaintiff alleges, a clerical mistake of the Court, arises out of an electronic communication made *ex parte* to the court. The Court takes judicial notice that such means of communication have been used in this Court for the purpose of cancelling a judicial sale. One may argue this liberty benefits both parties by allowing eleventh hour foreclosure avoidance. See, Chief Justice Toal's May 2, 2011 Order No. 2011-05-02-01. Lenders avoid holding distressed property. Borrowers achieve loan modification. Lenders have performing loans and Borrowers remain in their homes. However, the liberty afforded the foreclosure plaintiffs' bar to cancel unilaterally a judicial sale cannot be sustained without significant risks when before the foreclosure action is taken, "[A] Mortgagee's attorney, by proceeding with a foreclosure, represents to the Court that the Mortgagee has fully complied with all provisions of [Chief Justice Toal's] Order." The Plaintiff's attorneys may be found between the proverbial

¹⁰ The panel was Chief Appellate Judge Sanders and Judge Shaw.

rock and a hard place except that the Plaintiffs' bar should not engage in dual tracking (*supra*, footnote 5). Thus, Plaintiffs counsel who use "the eleventh hour communiqué" liberty take a significant risk when relying on a Court's already overburdened staff to strike a case from the roster of sales without making a proper motion before the Court. Additionally, last minute sale cancellations create uncertainty for the public upon whom the parties rely for competitive bidding. Ultimately, the cancelling of a sale once ordered, with the notice of sale signed and advertised, is a judicial determination. While this Court recognizes the facility of cancelling a sale on request by email, this process as this case demonstrates, is a mind field for errors. Certainly, the notification by email or telephone call is not a recognized process under the SCRCF. "Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us." Rule 501, SCACR, Code of Jud. Conduct, Preamble. By steering off course, as the Plaintiff admits it did, the burden of the mistake must lie at its feet. Were the clerical mistake made by the Court arising out of a Rule 7(b) written motion, the Plaintiff's argument would be justified. In this instance, the Plaintiff bears the burden of forestalling an unwanted result. The SCRCF provide a procedure, and the Court on proper written motion can independently, fairly and competently interpret and apply the applicable law. See, Brownlee v. Miller, 208 S.C. 252, 264-65, 37 S.E.2d 658, 663 (1946), which recites the following principal of law:

But all the cases recognize the principle that where a party in interest has been misled to his detriment by the officer making the sale, through no fault of his own, relief may be had. Ordinarily, however, it will not be granted for such mistakes or errors of judgment, unless they have been caused or contributed to by the officer making the sale, or the purchaser. It is also true that it is the policy of the law to sustain judicial sales fairly made-a wholesome rule which should be firmly adhered to.

See, also, *Howell v. Gibson*, 208 S.C. 19, 33, 37 S.E.2d 271, affirming the lower Court order, which provides:

Petitioner is seeking the equitable assistance of this Court. One of the elementary maxims of equity, long recognized in this State, is that he who seeks equity must come into Court with clean hands. For the reasons hereinabove stated, the Court is of the opinion that petitioner has failed to bring himself within this maxim. The respondent is an innocent party and were the Court to order a second sale of the property, respondent would be without power to protect himself at such a sale, and would be prevented by the admitted arrangement from becoming the highest bidder for the property. Should it be said that petitioner is also an innocent party, then either he or respondent must suffer by the Court's decision of the issues involved; and since petitioner brought about the situation, it is equity that he rather than respondent should suffer.

(4) Inadequacy of Sale Price

Plaintiff argues that Waypointe's bid is an inadequate sale price. Moreover, Plaintiff argues it is so inadequate that it should shock the conscience of the Court. The Plaintiff's basis for this argument is found in the following: "[T]he rule is well settled that inadequacy of price, unless so gross as to shock the conscience of the court, or accompanied by other circumstances warranting the interference of the court, will not justify the setting aside of a judicial sale."

Eastern Savings Bank, FSB (citing *Spillers* at 104, S.E.2d at 761 (citing [373 S.C. 356] *Brownlee v. Miller*, 208 S.C. 252, 37 S.E.2d 658 (1946))).

Plaintiff offers evidence that the value of the property is nearly ten times Waypointe's high bid of \$10,000. Plaintiff asserts the tax assessor for Dorchester County assesses the fair market value of the mortgaged property is \$114,655.00. A review of the subject purchase money note, secured by the mortgage, dated January 14, 2005, reveals a principal amount of \$113,897.00. Both facts may indicate the value of the property.

The tax assessed value is determined the County Tax Assessor. For real property that is owner occupied residential property S.C. Code Ann. § 12-43-215 provides:

When owner-occupied residential property assessed pursuant to Section 12-43-220(c) is valued for purposes of ad valorem taxation, the value of the land must be determined on the basis that its highest and best use is for residential purposes. When a property owner or an agent for a property owner appeals the value of a property assessment, the assessor shall consider the appeal and make any adjustments, if warranted, based on the market values of real property as they existed in the year that the equalization and reassessment program was conducted and on which the assessment is based.

S.C. Code Ann. § 12-43-217(A) provides, in part, "Notwithstanding any other provision of law, once every fifth year each county or the State shall appraise and equalize those properties under its jurisdiction.

S.C. Code Ann. § 12-37-3110 *et. seq.*, "The South Carolina Real Property Valuation Reform Act," requires county-wide reassessment every 5 years. Dorchester County's last county-wide reassessment was performed in 2008, thus establishing property values as of December 31, 2009. Customarily, the assessor uses the established sales price on conveyance as a significant factor in determining a property's fair market value for tax assessment.¹¹ Hence, at best, Plaintiff's reliance on the tax assessed value dates to 2008, not the fair market value as of the date of August 6, 2013 judicial sale. This Court takes further judicial notice that the fair market values in Dorchester County lagged behind Dorchester County tax assessed value by approximately 30%. This phenomenon began with the Great Recession, which has plagued the entire US economy since early 2007. Some neighborhoods, like the subject property, the disparity between tax assessed value and actual fair market values continue. The Court takes

¹¹ These findings are made by judicial notice.

judicial notice that the subdivision within which the subject property is located was developed in the mid-1970s and is mixed, "single family starter homes" that surround apartment complexes. See also, Waypointe's Flodine Affidavit, Exhibit A. These homes, therefore, are generally considered low income properties and less desirable than the new homes built in the early two thousands and marketed to first home buyers in Dorchester County. In short, the Court finds that the tax assessed value dated and not credible evidence of the fair market value of the real property. Similarly, the original principal balance of the note secured by the underlying mortgage is not a credible value under the circumstances of this case because the purchase was made at the height of the 2000s housing bubble. If anything, this VA guaranty loan amount¹² supports this Court's judicial notice that the subdivision is a low income neighborhood.

Waypointe counters the Plaintiff's valuation with its own opinion of the fair market value of the property. Waypointe's single member is a licensed general contractor who builds residential homes and does rehabilitation projects (remodeling and additions). Waypointe's testimony on the value of the property is credible and accurate. Waypointe stated it believed the value of the property without the benefit of an accurate assessment of its condition was \$25,000.00. Mr. Flodine testified however after acquiring the property and making a fair assessment of the patent condition he believed the property was worth far less than he originally determined from his research of property values in the neighborhood. Attached to Mr. Flodine's affidavit are photographs of the condition of the property as he initially found it (Waypointe's Flodine Affidavit, Exhibit D). These photographs are compelling evidence that the property was in complete disrepair. He testified that during the rehabilitation of the home he hired a plumber

¹² The Court takes judicial notice that VA loans are approved on 95% loan to value ratios. Moreover, the subject property had a second mortgage; a common financing occurrence during the 2000s real estate bubble.

to repair "pin-hole leaks" in the plumbing laid in the concrete slab foundation on which the house was built. Mr. Flodine also discovered the roof leaked requiring repair and concomitant unanticipated costs. These unanticipated, not readily apparent conditions of disrepair Mr. Flodine testified were not considered during the initial assessment of the house's condition. Mr. Flodine's testimony reveals he had to finance \$50,000.00 of the rehabilitation costs. His affidavit provides that the company's cost to repair the property was \$67,241.00, exclusive of overhead and profit. Including construction overhead and profit, he testifies the cost to repair is \$81,362.00. Mr. Flodine's is a credible witness; he kept a work flow day planner, daily logging the project's cost including entries for time and material. The Court does not find it necessary to determine whether he should be entitled to claim a right of investment return on the home, which admittedly he purchased as an investment. The Court finds that the \$10,000.00 price he paid for the property is adequate. Moreover, even if this Court deemed the high bid price inadequate, this Court would not find that \$10,000.00 for the subject property shocks the conscience.

The remaining question if the Court were to find the price inadequate, but does not shock the conscience of the Court, is whether the inadequate price that does not shock the conscience of the Court is accompanied by other circumstances warranting the interference of the court. *Brownlee, supra*, requires a finding that the other circumstances require setting aside the sale "where a party in interest has been misled to his detriment by the officer making the sale, through no fault of his own. . . . it will not be granted for such mistakes or errors of judgment, unless they have been caused or contributed to by the officer making the sale, or the purchaser.

The Plaintiff argues vehemently the Court failed to follow the custom of the court (See, also, Corley affidavit). The argument asserts this Court customarily pulls the sale when the

bidding agent reports that she has no bidding instructions. As previously stated the bidding agent presented herself at the judicial sale on August 6, 2013 without written authority to bid. She represented she bid for all of the plaintiff's law firms. Members of the Court's staff acknowledged she appeared all the time to bid for Plaintiffs' law firms. This Court was conducting its second judicial sale, having taken the bench July 1, 2013. During no exchange with this Court, did the bidding agent disavow she was not present for the Plaintiff. Under these circumstances, and as stated in footnote 5 above, this Court fails to see how its actions caused or contributed to misleading the bidders for this contested bid. For this reason, this Court finds no other circumstance prevails which warrant intervention. Likewise, as discussed at length in Plaintiff's third ground, the failure to obtain a VA appraisal is not a matter for which this Court is responsible especially in view of the Plaintiff's attorneys fee affidavit reciting it had received bidding instructions from the Plaintiff.

This Court having carefully reviewed the Motion, the affidavits, the memoranda, the exhibits, and the argument of counsel finds that the equities between the Plaintiff and Waypointe weigh in favor of Waypointe. Waypointe exhibited due diligence. It was vigilant. Waypointe demonstrates it acted in good faith. On the contrary Plaintiff demonstrates a failure of diligence or vigilance. Perhaps even more troubling, Plaintiff's affidavits in support of its motion contradict its attorneys' fees affidavit. The affidavits come from the Plaintiff's counsel, and an employee of Plaintiff's counsel. These are untenable. They put the Court in a position of judging the credibility of a lawyer, and its staff. This disfavors the Court. See, South Carolina Rule Appellate Procedure 407 RPC, Rule 3.7:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

See, also, the Editor's Notes.

The affidavit of Mr. Corley touches on contested issues although he does attempt to provide it in the context of an explanation of "customs of the court." The same would better be argued by way of a memorandum of law. The Affidavit fails to point to rules of law that establish a "custom of the court" as a basis for Plaintiff's reliance on facts Plaintiff's counsel maintain should control this Court. Moreover, this Court found no rule of law that establishes precedential value to a "custom of the court." This Court possesses no "custom of the Court." This Court finds nothing in the South Carolina Rules of Civil Procedure that allows a Court to establish a "custom of the court." South Carolina does not have a method of establishing a "local rule" as does the Federal District Court.

Unfortunately, the Plaintiffs' lawyers left the notification to cancel the sale of the Court to a non-lawyer who never received a confirmation from the Court that the sale would be pulled. Incredulous is the Plaintiffs' lawyers' position that an email that does not bounce is adequate confirmation that an email was received much less that the scheduled sale had been withdrawn.

The responsibility of communicating with the Court is that of a lawyer, and putting a paralegal or secretary in that charge is simply irresponsible. In this Court's view, a communication that seeks a modification of the Court's order and prescribed process is the

practice of law. As successful bidder and owner, Waypointe acted in good faith. Waypointe did nothing in its action that is unfair, or unreasonable. Hence, the equities favor Waypointe.

Attorneys Fees

Waypointe asserts a right to attorneys' fees. The Court denies this request. In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees. Harrison-Jenkins v. Nissan Car Mart 557 S.E.2d 708, 711 (S.C. Ct. App. 2001) citing, Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997); American Fed. Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996); Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993); Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989); Dowaliby v. Chambless, 344 S.C. 558, 544 S.E.2d 646 (Ct.App.2001); Harvey v. South Carolina Dep't of Corrections, 338 S.C. 500, 527 S.E.2d 765 (Ct.App.2000); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct.App. 1998); Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (CtApp.1990).

In order to sustain a claim for equitable indemnity, the existence of some special relationship between the parties must be established." Toomer v. Norfolk S. Ry. Co., 344 S.C. 486, 492, 544 S.E.2d 634, 637 (Ct.App.2001). "[A] sufficient relationship exists [for indemnification] when the at-fault party's negligence or breach of contract is directed at the non-faulting party and the non-faulting party incurs attorney fees and costs in defending itself against the other's conduct. Winnsboro, 307 S.C. at 132, 414 S.E.2d at 121. See, Rhett v. Gray, 401 S.C. 478, 497-98, 736 S.E.2d 873, 883-84 (Ct. App. 2012), reh'g denied (Jan. 25, 2013).

Even though Waypointe may have sought advice of an attorney and incurred attorney's fees of approximately \$9,000.00, an award of attorney's fees is not an available remedy to it. Under South Carolina law, attorney's fees can be awarded only if authorized by statute or by contract. A third party does not enjoy a special status merely by successfully bidding at a judicial sale. Moreover, the equitable indemnification doctrine does not afford the third party bidder a remedy for recovery of its expenses, including attorney's fees and costs. The facts of this case simply do not support an award of equitable indemnification of costs and expenses incurred by Waypointe to defend the Motion to Vacate. Therefore, it is

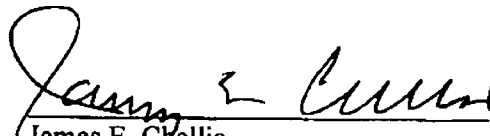
ORDERED, ADJUDGED, AND DECREED that the Plaintiff's Motion is denied; and it is

ORDERED, ADJUDGED, AND DECREED that each party shall pay its own costs, including attorneys' fees and costs; and it is

SO ORDERED!

St. George, South Carolina

December 20, 2013


James E. Chellis
Dorchester County Master-in-Equity

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF DORCHESTER
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012CP1800376

FILED-RECORDED

Jp Morgan Chase Bank

2013 DEC 20 PM 3:58

Inda Ravenel

Household Finance
 Corporation II

CHERYL GRAYAM
 CLERK OF COURT
 DORCHESTER COUNTY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3078

Judge Code

12/20/2013

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Andrew William Montgomery PO Box 100200 Columbia,
SC 29202-3200

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Maria D. Dempsey, AWR

Cheryl Graham

Court Reporter

- Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF DORCHESTER
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012CP1800376

Jp Morgan Chase Bank

2014 MAR -5 AM 9:57

Inda Ravenel

Household Finance
 Corporation II

CLERK OF COURT
 DORCHESTER COUNTY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
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 Rule 43(k), SCRPC (Settled); Other: _____
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 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: Plaintiff's motion to Reconsider denied.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

[Signature]

3078

Judge Code

2/24/2014

Date

For Clerk of Court Office Use Only

3-5-2014

3-5-2014

This judgment was entered on ~~February 24, 2014~~ and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Andrew William Montgomery PO Box 100200 Columbia, SC 29202-3200

Steven L. Smith PO Box 40578 Charleston, SC 29423-0578

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Maria D. Dempsey, AWR

Cheryl Graham

Court Reporter

- Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

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