THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Appellate Case No. 2012-213400

Wachesaw Plantation East Community Services Association, Inc., ... Respondent,

v.

Todd C. Alexander, ... Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

In 2001 Todd Alexander paid $263,500.00 for a house in Wachesaw Plantation East. In 2011 the market value of the house was $316,800.00 according to the Georgetown County Tax Assessor. (Master's Order Denying Motion p. 4, R. p. 24)

When Alexander was notified by the Wachesaw Plantation East homeowners association's attorneys that a lien had been placed against the house for delinquent regime fees, he believed that he could easily resolve the matter when his health returned to a more stable condition and he was better able to focus on financial matters. (Alexander Affidavit p. 3, R. p. 98) He suffers from dilated cardiomyopathy as a result of cardiac sarcoidosis and has frequent hospitalizations for related heart and organ failure and secondary illnesses. (Alexander Affidavit pp. 1-2, R. pp. 96-97) The $761.00 in past due assessments and late fees claimed by the homeowners association was trivial compared to his equity in the house.

Alexander continued to pay regime fees to the homeowners association. (Alexander Affidavit pp. 3-4, R. pp. 98-99) He did not know that a foreclosure decree had been issued or that the property had been advertised for sale. (Alexander Affidavit p. 4, R. p. 99) He was hospitalized from May 28, 2011 through June 10, 2011 for ablation surgery to correct chronic arrhythmias. (Alexander Affidavit p. 2, R. p. 97) On June 7, 2011, the day after the sale, copies of the foreclosure decree and notice of sale were brought to his hospital room. (Alexander Affidavit p. 2, R. p. 97) He had no knowledge of the foreclosure sale until June 7, 2011, the day after the sale. (Alexander Affidavit p. 4, R. p. 99)

Jerry Calahan placed the high bid at the foreclosure sale of $181,000.00. (Master's Order Denying Motion p. 1, R. p. 21) The bid of $181,000.00 was $135,000.00 less than the tax valuation of the house.

Alexander tendered payment in full to the homeowners association's attorney on June 16, 2011. (Smith Affidavit p. 1, R. p. 101) The homeowners association's attorney declined the tender because of concern about potential liability to the third party bidder. (Smith Affidavit p. 1. R. p. 101) The motion to vacate the sale was filed and served on June 17, 2011 and reaffirmed that Alexander was ready, willing and able to pay in full the judgment in this action. (Motion to Vacate Sale, R. pp. 1-2) Jerry Calahan did not comply with his bid until June 24, 2011, seven days after the motion to vacate the sale was filed. (Smith Affidavit p. 1, R. p. 101)

Jerry Calahan was notified of the motion to vacate the sale. Jerry Calahan filed and served a Memorandum of Third Party Bidder opposing the motion and appeared through his attorney at the hearing. (Memorandum of Third Party Bidder, R. pp. 16-20) The Master denied the motion to vacate the sale and issued a deed to William George.

Alexander timely filed and served Notice of Appeal from the Master's Order Denying Motion. (Notice of Appeal, R. p. 27) William George filed and served a Motion to Dismiss Appeal on the grounds that the issue appealed was moot. (Motion to Dismiss Appeal, R. pp. 28-61) Alexander filed and served a Return to the Motion to Dismiss Appeal. (Return to Motion to Dismiss Appeal, R. pp. 84-102)

By an Order dated May 25, 2012, the Court of Appeals summarily dismissed Alexander's appeal on the ground that the appeal was moot. (Court of Appeals Order dated

May 25, 2012, R. p. 167) Alexander timely filed and served a Petition for Rehearing. By an Order filed October 18, 2012, the Court of Appeals denied Alexander's Petition for Rehearing.

ARGUMENTS

1. The Court of Appeals erred in hearing and granting a motion to dismiss this appeal by a person who is not a party.

William George was not named as a party in the initial pleadings. William George did not apply to intervene as permitted by Rule 24 of the Rules of Civil Procedure. William George did not apply to intervene in this appeal or to file an amicus curiae brief as provided in Rule 213 of the Appellate Court Rules. Jerry Callahan was the third party bidder at the foreclosure sale.

This Court has held that a person is required to formally intervene and become a named party to participate in an appeal. In *Condon v. State*, 354 S.C. 634, 583 S.E.2d 430 (2003) the South Carolina Attorney General attempted to object to the circuit court's award of attorney fees without formally intervening and becoming a party. The Attorney General was not a party to the action originally and never intervened to become a party as permitted by Rule 24, SCRCP. This Court recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the state and its citizens. Still this Court stated that, ". . . the Attorney General is *required*, like everyone else, to formally intervene and become a named party before he can file an appeal" and made clear, ". . . that the Attorney General is required to follow the Rules of Civil Procedure when he wishes to become involved in a case." 354 S.C. 642, 583 S.E.2d 434.

In *Ex parte South Carolina Department of Motor Vehicles*, 390 S.C. 457, 702 S.E.2d 568 (2010) the South Carolina Department of Motor Vehicles (SCDMV) attempted to appeal

from a circuit court order. Because the SCDMV is not a named party to the case, this Court dismissed the appeal holding:

> A well-known rule of appellate procedure is that only an aggrieved party may appeal. Rule 201(b), SCACR; see also *Condon v. State*, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003) ("[T]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal."). Having failed to intervene as a party, SCDMV's appeal is dismissed.

The South Carolina Attorney General and the SCDMV were required to follow the Rules of Civil Procedure and the Appellate Court Rules when they wished to become involved in a case. William George should also be required to follow the Rules of Civil Procedure and the Appellate Court Rules if he wishes to become involved in this case.

Rule 240 of the Appellate Court Rules governs motions and petitions generally. The rule repeatedly refers to actions permitted or required of parties. Rule 240 does not authorize motions by persons, such as William George, who are not parties to the action.

William George could have applied to the trial court to intervene pursuant to Rule 24 of the Rules of Civil Procedure. He did not. Instead the Master-in Equity was told that Jerry Callahan was the high bidder at the foreclosure sale. (Master's Order Denying Motion pp. 1 and 2, R. pp. 21 and 22) William George could have applied to the Court of Appeals to intervene or for leave to file an amicus curiae brief pursuant to Rule 213 of the Appellate Court Rules. He did not. Instead he chose to remain in the shadows, not a named party in the action, not subject to the courts' rules and requirements.

If persons who are not named parties are allowed to become involved in appeals, then delay, uncertainty, confusion and mischief will be the inevitable results. In the present

appeal, William George served his Motion to Dismiss on September 22, 2011, thereby stopping consideration of the merits of this appeal before the briefs and transcript of record were even filed. In other appeals, of more interest to the public or potentially affecting more people, the results may be even worse.

2. The Court of Appeals erred in creating a new rule that a judicial sale cannot be appealed unless a writ of supersedeas has been issued and a bond posted.

The Court of Appeals did not address the merits of this appeal. Instead the Court of Appeals created a new rule that foreclosures and other judicial sales cannot be appealed unless a writ of supersedeas has been issued and a bond posted preventing issuance of a deed. The Court of Appeals stated:

> Appellant failed to comply with the mandates of section 18-9-170 of the South Carolina Code, and, accordingly, the order was not stayed by the appeal. Because the master has now properly issued the deed, this appeal is moot. Accordingly, this appeal is hereby dismissed.
>
> (Court of Appeals Order filed 5/25/12, R. p. 167)

South Carolina Code Section 18-9-170 is not a mandate. The section provides that if a judgment directs the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless the specified appeal bond is posted. The section offers an appellant a choice. An appellant can either (a) post the specified bond, obtain a writ of supersedeas and retain possession of the property during the appeal, or (b) not post the bond and forgo possession of the property during the appeal. In the present case William George had already taken possession of Alexander's property when the Notice of Appeal was filed.

The Court of Appeals interpretation of South Carolina Code Section 18-9-170 as mandating posting an appeal bond and obtaining a writ of supersedeas is obviously incorrect. Even William George acknowledges: "A party is free to appeal a foreclosure sale without posting a bond or obtaining a supersedeas." (Return to Petition for Writ of Certiorari p. 5-6)

The Court of Appeals' new rule is contrary to the established appellate practice in this state. In *Ex Parte Moore*, 346 S.C. 274, 550 S.E.2d 877 (Ct. App. 2001), Moore initially

petitioned for a writ of supersedeas. The petition for a writ of supersedeas was subsequently withdrawn and a deed was issued to the high bidder. 346 S.C. at 282, 550 S.E.2d at 881. The first lien holder moved to dismiss Moore's appeal on the ground it had become moot and the Court of Appeals denied the motion to dismiss. 346 S.C. at 282-283, 550 S.E.2d at 881. The Court of Appeals reversed the trial court and vacated the sale. *Id.*, rev'd on other grounds *Ex Parte Moore*, 352 S.C. 508, 573 S.E.2d 561 (2003).

In *Carsten v. Wilson*, 241 S.C. 516, 129 S.E.2d 431 (1963), this Court noted that the defendant had not posted a bond to stay the foreclosure sale and proceeded to consider the merits of the appeal.

The fact that this appellant has forgone possession of his property during an appeal does not render his appeal moot. William George was not a bona fide purchaser for value without notice. He took possession of Alexander's property with full knowledge of Alexander's motion to vacate the sale. This Court and the Court of Appeals have the power to vacate sales in appropriate cases and have the ability to grant effective relief to Alexander.

3. The Court of Appeals erred in holding - in conflict with *McLemore v. Powell*, 325 S.C. 582, 10 S.E. 550 (1880) - that issuance of a deed renders an appeal from a judicial sale moot.

In *McLemore v. Powell*, 32 S.C. 582, 10 S.E. 550 (1889), McLemore obtained a foreclosure decree. Powell appealed. McLemore moved to dismiss the appeal on the ground that no bond had been filed to stay the sale and the sale had been made. This Court denied the motion and heard the appeal. *See also*: SOUTH CAROLINA LAWYER, May 20, 2012, at 25 (judgment debtor not obtaining a supersedeas does not affect the appeal on its merits).

Issuance of a deed does not prevent an appellate court from granting effective relief. A conveyance may be set aside and a sale may be vacated. *See e.g.*: *Thornton v. Thornton*, 328 S.C. 96, 108, 492 S.E.2d 86, 92 (1997) (the trial court directed the clerk of court to convey an office building and land; the clerk of court conveyed the real property; this Court reversed the trial court and vacated the transfer) and *Ex Parte Moore, supra*, note 6, ("... a foreclosure sale that was improperly conducted so as to prejudice interested parties is void and, therefore, the sale may be set aside by the reviewing court.") and *Howell v. Gibson*, 208 S.C. 19, 32, 37 S.E.2d 271, 276 (1946) ("A mistake or some surprise or accident in connection with the sale is ground for setting it aside, either before or after confirmation, provided the mistake was an injurious one, caused by someone connected with the sale, and was not a mistake of law or one due to the negligence of the party complaining.").

The issuance of a deed did not render this appeal moot. William George was not a bona fide purchaser for value without notice. He acquired the deed to Alexander's property with full knowledge of Alexander's motion to vacate the sale. This Court, and the Court of

Appeals, have the power to vacate sales in appropriate cases and have the ability to grant effective relief to Alexander.

CONCLUSION

McLemore v. Powell, 32 S.C. 582, 10 S.E. 550 (1880) should be followed, the Court of Appeals' dismissal of this appeal should be reversed and the parties should proceed with serving and filing their initial briefs.

Respectfully submitted,

May 5, 2014

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PROOF OF SERVICE

I certify that I served the Brief of Petitioner and Appendix on Wachesaw Plantation East Community Services Association, Inc. by depositing a copy in the United States Mail, postage prepaid, on May 5, 2014 addressed to its attorney of record, Hal LaVaughn Beverly, Jr., 4610 Oleander Drive, Suite 203, Myrtle Beach, South Carolina 29577 and on William George by depositing a copy in the United States Mail, postage prepaid, on May 5, 2014 addressed to his attorney of record, Jack M. Scoville, Jr., Post Office Drawer 1228, Georgetown, South Carolina 29442.

May 5, 2014

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