

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS
Sixteenth Judicial Circuit

S. Jackson Kimball, Master-in-Equity,
Special Circuit Court Judge

Case No. 2013-002791

Provident Community Bank,Respondent,

v.

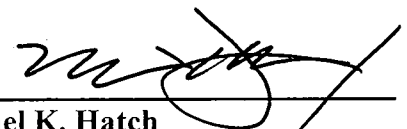
Coulston Enterprises, Inc., Alfred Earl Coulston, a/k/a A. Earl Coulston, Red Clay
Industries, Inc., and HD Supply Waterworks, Ltd., Defendants

of whom

Alfred Earl Coulston a/k/a A. Earl Coulston is the Appellant.

Initial Brief of Respondent

May 1, 2014


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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Judge properly amend the Order for Deficiency Judgment to correct a clerical error under Rule 60(a) of the South Carolina Rules of Civil Procedure, thereby making the Order for Deficiency Judgment conform to the underlying Record of Hearing and resulting Judgment of Foreclosure and Sale?

- II. Did the Trial Judge properly amend the Order for Deficiency under Rule 60(a) of the South Carolina Rules of Civil Procedure because the motion was timely and said rule provides no time limitation?

RESPONDENTS STATEMENT OF THE CASE

Respondent, Provident Community Bank, agrees with Appellants statement of the case in most but not all respects and therefore brings to the Courts attention certain facts omitted from the Appellants statement that bear upon this matter.

Namely, Respondent did file under Rule 60(b), on October 11, 2013, but Respondent subsequently withdrew the motion to amend under Rule 60(b) and substituted a motion for relief under Rule 60(a). Respondent moved under Rule 60(a) to correct a clerical error or omission contained in the original Order for Deficiency Judgment because the original Order for Deficiency Judgment omitted the name of Appellant.

Respondent's motion and the subsequent order granting the motion, conform the Order for Deficiency Judgment to the underlying Summons (Summons 3/30/2011), Complaint (Complaint 3/30/2011), Record of Hearing (Record of Hearing 10/7/2011), Judgment of Foreclosure and Sale (Judgment 10/7/2011, Notice of Sale (Notice 10/7/2011), and Amended Notice of Sale (Amended Notice 10/25/2011); all of which demanded a deficiency judgment against Appellant. The record of the case shows that Respondent specifically demanded deficiency judgment against Alfred Earl Coulston individually from the institution of the lawsuit to the sale. At no point did the Respondent request or authorize counsel, nor did Respondent's counsel intend, to waive the deficiency against Alfred Earl Coulston individually.

ARGUMENT

I. THE TRIAL JUDGE PROPERLY AMENDED THE ORDER FOR DEFICIENCY JUDGMENT TO CORRECT A CLERICAL ERROR OR OMISSION UNDER RULE 60(a) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE, THEREBY MAKING THE ORDER FOR DEFICIENCY JUDGMENT CONFORM TO THE UNDERLYING RECORD OF HEARING AND RESULTING JUDGMENT OF FORECLOSURE AND SALE.

The Trial Judge properly amended the Order for Deficiency Judgment to correct a clerical error or omission under Rule 60(a) of the South Carolina Rules of Civil Procedure to conform the Order for Deficiency Judgment to the underlying record of the case. For this Court's examination, Respondent will provide all pleadings from the complaint to the notice of sale, which all show that throughout the case, a deficiency was demanded against Alfred Earl Coulston personally, and that it was therefore appropriate to amend the Order for Deficiency Judgment to comport with the record of the case.

Respondent agrees with Appellant's statement that under Rule 60(a) only "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." S.C. R. Civ. P. 60(a). Respondent further agrees that, as stated in Black's Law Dictionary, "[g]enerally, a clerical error is defined as a mistake in writing or copying." Black's Law Dictionary 252 (6th ed. 1990). As applied to judgments and decrees, a clerical error is a mistake or omission by a clerk, counsel, judge or printer which is not the result of exercise of judicial function. *See Id.* While a court may correct mistakes or clerical errors in its own process to make it conform to the record, it cannot change the scope of the judgment. Michel v. Michel, 289 S.C. 187, 345 S.E.2d 730 (Ct. App. 1986). Dion v. Ravenel, Eiserhardt Associates, 316 S.C. 226, 230, 449 S.E.2d 251, 253-54 (Ct. App. 1994).

The exclusion of Appellant's name from the Order for Deficiency Judgment was an omission due to oversight and moving to amend the Order for Deficiency Judgment under Rule

60(a) to include Appellant's name did not vary or change the scope of the Judgment of Foreclosure and Sale in any respect. Furthermore, the motion to amend operated to conform the Order for Deficiency Judgment to the record of the case.

Although there is no direct case on point, the Supreme Court faced a similar issue in the case of Tri-County Ice and Fuel Co. v. Palmetto Ice Co. 303 S.C. 237, 399 S.E.2d 779 (1991). In that case, Tri-County filed a summons and complaint against Palmetto Ice, asserting a cause of action for conversion. Tri-County served George Helmly as president of Palmetto Ice, but Mr. Helmly made no response to the summons or complaint. Tri-County entered default and reference pleadings to the master-in-equity and set a damages hearing, and served notice of all on Mr. Helmly. Thereafter, the master-in-equity awarded judgment to Tri-County, which Tri-County subsequently attempted to execute.

After the execution was attempted, Palmetto Ice filed a motion to vacate on the grounds that Palmetto Ice was not a legal entity but merely a trade name, at which time Tri-County was informed for the first time that Palmetto Ice was owned and operated by P&H Company, Inc. Tri-County moved to amend under Rule 60(a) to substitute P&H Company, Inc. The trial judge granted the motion and an appeal followed. The Supreme Court upheld the grant of the Rule 60(a) motion because, under the circumstances, the amendment was not so extensive as to substitute a new plaintiff and was merely corrective of a clerical mistake. Further, the Supreme Court found that there was no prejudice to Helmly or P&H Company, Inc. because it was clear from the record that P & H Company, Inc. and its president, Helmly, have not been misled to their prejudice as to the nature of the lawsuit. More importantly, as a matter of law in South Carolina, the Master in Equity has no discretion to deny the mortgagee's right to a deficiency

judgment. Am. Gen. Fin. Servs., Inc. v. Brown, 376 S.C. 580, 584, 658 S.E.2d 99, 101 (2008) (quoting Bartles v. Livingston, 282 S.C. at 461, 319 S.E.2d at 715). Under the case of American General Financial Services, Inc. v. Brown, it was held that “[a]bsent grounds to set aside the decree of foreclosure, there is **no discretion** to cut off the right to a deficiency after sale where (1) the complaint in the foreclosure action asks for personal judgment, (2) the amount of the debt is fixed in the foreclosure decree, and (3) the sale is insufficient to satisfy the entire debt.” (emphasis added). *See Id.*

The Appellant herein was served with a Summons and Complaint (See Record of Hearing 0/0/00) which demanded deficiency judgment, and had he read the summons, lis pendens or complaint (Complaint 3/30/2011), answered or otherwise appeared in the foreclosure case, he would have known that a deficiency was demanded of him.

This Court should also consider that in all foreclosure cases, the mortgagee is entitled to a deficiency judgment unless the right is specifically waived or there is some statutory prohibition. Am. Gen. Fin. Servs., Inc. v. Brown, 376 S.C. 580, 583, 658 S.E.2d 99, 100 (2008) (quoting Perpetual Bldg. & Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 341, 242 S.E.2d 407, 408 (1978)). “[T]he general rule is that “if the mortgaged premises are sold under a foreclosure decree and fail to bring a sufficient amount to satisfy the debt, the mortgagee is entitled, absent any statutory limitation or waiver on his part, to a personal judgment for the remaining deficiency.” *Id.* (citation omitted). Moreover, “a mortgagee is not denied the full amount due him merely because he elects initially to pursue his remedy by foreclosure. An action for a deficiency judgment as a sequel to foreclosure is taken as a matter of course.” *See also Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. at 341, 242 S.E.2d at 408 (1978) (An action for a

deficiency judgment as a sequel to foreclosure is taken as a matter of course. *See* Garrard Glenn, 1 Glenn on Mortgages § 69 (1943). This appears to be true even when the mortgagee neglects to plead specifically for a deficiency judgment. It has been held that a court has “inherent power” to authorize a decree for deficiency, and that no specific notice or motion need be given to the defendant inasmuch as such decree follows implicitly. 92 C.J.S. Vendor & Purchaser § 448 (2005). “Moreover, since a decree for a deficiency is an incident of a foreclosure suit in equity, it may be granted under a prayer for general relief.” 55 Am. Jur.2d Mortgages § 909 (1971)).

The Respondent appropriately demanded a deficiency against Appellant in the Complaint and all subsequent pleadings. The failure to name Appellant in the final deficiency judgment pleading was a mistake or clerical error; and the Appellant should not be allowed by way of this appeal to delay the enforcement of the personal judgment against him.

II. THE TRIAL JUDGE PROPERLY AMENDED THE ORDER FOR DEFICIENCY JUDGMENT UNDER RULE 60(A) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE BECAUSE THE MOTION WAS TIMELY AND SAID RULE PROVIDES NO TIME LIMITATION.

Under Rule 60(a), the court or any party may move to correct clerical mistakes arising from oversight or omission at any time. There is no limitation within the rule that operates to deprive the trial judge of jurisdiction to correct clerical mistakes. “Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, leave to correct the mistake must be obtained from the appellate court. The ending of a term of court or departure from the circuit shall not operate to deprive the trial judge of jurisdiction to correct

such mistakes. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion". Rule 60, South Carolina Rules of Civil Procedure (1998).

The relief the Appellant requests by way of this appeal is prohibited by basic rules of statutory construction.

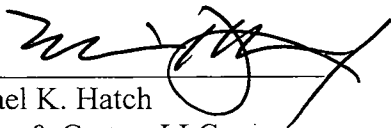
In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E.2d 906 (1994). If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced. See Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) *quoting Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 558 S.E.2d 511 (2002).

The Appellant should not be allowed by way of this appeal to imply the specified time limitation of Rule 60(b), the subsequent rule of civil procedure, into the preceding rule, Rule 60(a) where none is stated and no implication is made.

CONCLUSION

Based upon the foregoing, the motion to amend was timely and the trial judge correctly ruled to amend the Order for Deficiency Judgment under Rule 60(a).

Respectfully submitted,



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