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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

Case No. 2014-000140

Bank of America, N.A. Respondent,
v.
Willie Zimmerman Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. DID APPELLANT PRESERVE APPELLATE REVIEW OF THE MASTER'S ORDERS VACATING SALE ON JULY 30, 2013 AND DECEMBER 17, 2013?
2. DID THE MASTER-IN-EQUITY ERR IN VACATING EITHER THE APRIL 1, 2013 OR SEPTEMBER 3, 2013 JUDICIAL SALES AFTER APPELLANT FAILED TO SATISFY THE REMAINING BID WITHIN THE PRESCRIBED TIME LIMIT?
3. DID THE MASTER-IN-EQUITY VACATE EITHER THE APRIL 1, 2013 OR SEPTEMBER 3, 2013 JUDICIAL SALES UPON THE MISTAKE OF RESPONDENT OR UPON INSUFFICIENT EVIDENCE OF INADEQUATE PRICE?

STATEMENT OF THE CASE

Bank of America, N.A. (Respondent), filed its Summons and Complaint seeking Non-Jury Mortgage Foreclosure against Duce Staley (Defendant) on November 23, 2011. On September 20, 2012, Judge Joseph M. Strickland executed an order granting foreclosure and directed the foreclosure sale of the subject property on April 1, 2013 requiring the successful bidder to deposit five percent at sale and to fully comply with the remaining bid within twenty days. At sale, Willie Zimmerman (Appellant) placed the highest bid and deposited five percent with the court. Appellant failed to provide the remaining ninety five percent of the bid within twenty days and Judge Strickland vacated the sale by order on July 30, 2013 and returned Appellant's deposit. Appellant did not object at the subsequent hearing to address the bidding deficiencies or seek reconsideration. Appellant similarly bid at sale on September 3, 2013, submitted five percent of the bid and failed to provide the remaining ninety five percent within the prescribed time. Appellant did not object at the subsequent hearing to address the bidding deficiencies or seek reconsideration. Appellant's proof of service of notice of appeal remains outstanding, however, Appellant filed his notice of appeal with this Court on January 6, 2014.

FACTS

Bank of America, N.A. (Respondent), filed its Summons and Complaint seeking Non-Jury Mortgage Foreclosure against Duce Staley (Defendant) on November 23, 2011. Defendant failed to appear or otherwise file in the action and an affidavit of default was filed May 29, 2012. On March 24, 2012 the action was referred to Judge Joseph M. Strickland as Master in Equity of Richland County pursuant to Rule 53, SCRPC. Rule 53, SCRPC. A final hearing was scheduled on August 20, 2012. As a result of the hearing, on September 20, 2012 Judge Joseph M. Strickland executed an order granting foreclosure and directed the foreclosure sale of the subject property on April 1, 2013 requiring the successful bidder to deposit five percent at sale and to fully comply with the remaining bid within twenty days. Fcl. Order p. 4, ¶ 22. At sale, Willie Zimmerman (Appellant) placed the highest bid and deposited five percent with the court. Appellant failed to provide the remaining ninety five percent of the bid within twenty days and Judge Strickland vacated the sale by order on July 30, 2013 and returned Appellant's deposit. Order Vct. p. 1. Appellant did not object at the hearing to address the bidding deficiencies on June 21, 2013 or seek reconsideration. June Transcript p. 17, ¶ 2-11. Judge Strickland again directed the sale of the subject property on September 3, 2013 and Appellant was the successful bidder depositing five percent with the court. After enlargement of time from twenty days from the sale date to November 4, 2013, and later to December 16, 2013, Appellant failed to provide the remaining ninety five percent of the bid and the September 3, 2013 sale was vacated. 2nd Order Vct. p. 1-2. Appellant did not object at the hearing to address the bidding deficiencies on November 21, 2013 or seek reconsideration. Nov. Transcript p. 15-19. Appellant's proof of service of notice of appeal remains outstanding, however, Appellant filed his notice of appeal with this Court on January 6, 2014.

ARGUMENT

1.

Appellant asserts that because the Appellant did not contribute to a mistake in the foreclosure sale the Court erred in setting aside the April 1, 2013 sale. Respondent now argues that Appellant did not make a timely objection to the July 30, 2013 Court order vacating the sale. A contemporaneous objection is required to preserve an issue for appellate review. *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 23, 698 S.E.2d 612, 624 (2010). Review of the transcript shows that when the Honorable Joseph M. Strickland, Master in Equity of Richland County, ordered the resale of the property and vacated the first judicial sale there was no objection by or on behalf of the Appellant. June Transcript p. 17, ¶ 2-11. Similarly, Appellant did not file a motion for reconsideration. Rule 59(e), SCRPC. Finally, this appeal was filed more than thirty days after the execution of the order and subsequent to a second order vacating a second sale issued on December 17, 2013. Rule 203(b)(4), SCACR. Without making a timely objection at hearing on June 21, 2013, moving the court to reconsider its order vacating sale executed July 30, 2013 or timely filing his notice of appeal, Appellant did not preserve this issue for appeal and this appeal should be dismissed.

Where Appellant's Notice of Appeal references Judge Strickland's Order Vacating Sale and Forfeiture of Deposit as executed on December 17, 2013, Respondent submits that Appellant similarly did not object at the hearing to address the bidding deficiencies on November 21, 2013 or move for reconsideration. At hearing on November 21, 2013, Appellant, through counsel, accepted the terms of the December 2013 without objection. Nov. Transcript p. 15-19. Where there were no acts of

preservation as to the December 17, 2013 Order Vacating Sale and Forfeiture of Deposit this appeal should similarly be dismissed.

2.

Appellant asserts that because the Appellant did not contribute to a mistake in the foreclosure sale the Court erred in setting aside the April 1, 2013 sale. However, Appellant failed to comply with the Judgment of Foreclosure and Sale where he did not provide the remaining ninety five percent of the bid as ordered. “Where the bidder at a judicial sale refuses to pay the amount of his bid, the court may, without confirming the sale by a formal rule, order a resale at his risk both in respect to the expenses of the resale and any deficiency resulting therefrom.” *Camden v. Mayhew*, 129 U.S. 73, 79, 9 S. Ct. 246, 248 (1889). “[T]he determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court.” *E. Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (Ct. App. 2007).

The language of the court order sets the terms of the sale. *Ex parte Moore*, 352 S.C. 508, 510, 575 S.E.2d 561, 562 (2003). “The judgment shall [] specify the amount of good faith deposit necessary at the time of the sale, and the date that compliance must be made with the bid.” Rule 71(b), SCRCF. The Master issued a Judgment of Foreclosure and Sale providing “[t]he Master will require a deposit of . . . (5%) . . . same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within Twenty (20) days same to be forfeited” Fcl. Order p. 5, ¶ 4. The Order further provides that the;

Plaintiff, or any other party to this action, may become a purchaser at such sale, and that if, upon such sale being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within Twenty (20) days after date of sale, then the Master in Equity may advertise the said premises for

sale on the next, or some subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

Fcl. Order p. 5, ¶ 8.

Upon the sale of the property on April 1, 2013, the Appellant paid the required five percent. However, per Judge Strickland's Order, the Appellant failed to provide the remaining ninety five percent of the bid within the time prescribed and so the sale was vacated. The Order provided, "[m]ore than twenty (20) days have passed since the sale and Mr. Zimmerman failed to comply with the bid . . . [t]he foreclosure sale of the subject property is void" Order Vct. p. 1. Therefore, the Master-in-Equity acted within his power to vacate the prior sale and order a resale of the property.

Where Appellant's Notice of Appeal references Judge Strickland's December 17, 2013 Order Vacating Sale and Forfeiture of Deposit, Respondent submits that the Appellant similarly failed to provide the remaining ninety five percent of the bid within the time prescribed and so the sale was property vacated. The Order provided, "[i]t now appears that the closing in which Mr. Zimmerman was to have obtained the funds necessary to comply with his bid at the September 3, 2013 sale was not completed . . . [and] the foreclosure sale . . . on September 3, 2013 is void" 2nd Order Vct. p. 1. Therefore, the Master-in-Equity acted within his power to vacate the prior sale and order a resale of the property.

3.

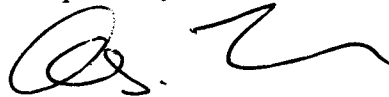
Appellant asserts that the sale was vacated upon Respondents mistake or, in the alternative, upon insufficient evidence of inadequate price so gross as to shock the conscience. Respondent respectfully submits that these assertions are without merit

where Judge Strickland's orders vacating sale as executed on July 31, 2013 and December 17, 2013 specifically vacate the sale upon Appellant's failure to provide the remaining ninety five percent bid as instructed. Order Vct. p. 1, 2nd Order Vct. p. 1. Appellants appeal upon these assertions should be dismissed for lack of merit.

CONCLUSION

For the reasons set forth above, this Court should affirm the July 30, 2013 and December 17, 2013 orders vacating sale.

Respectfully submitted,



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June 13, 2014

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APPEAL FROM RICHLAND COUNTY

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Joseph M. Strickland, Master in Equity

Case No. 2014-000140

Bank of America, N.A.

Respondent,

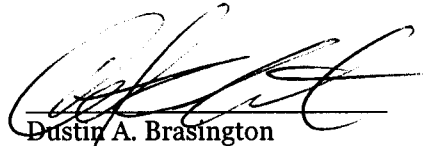
v.

Willie Zimmerman

Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent on Willie Zimmerman by depositing a copy of it in the United States Mail, postage prepaid, on June 13, 2013 addressed to Appellant, Willie Zimmerman, 106 Hever Court, Irmo, SC 29063.



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