THE SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Joe M. Crosby, Master-in-Equity
Trial Court Case Number 2010 CP 22 1583
Appellate Case No. 2012 213400

Wachesaw Plantation East Community Services Association, Inc.,

Respondent,

v.

Todd C. Alexander,

Petitioner.

BRIEF OF WILLIAM GEORGE, THIRD PARTY BIDDER

Law Offices of Jack M. Scoville, Jr., P.A.
Jack M. Scoville, Jr.
Post Office Drawer 1228
Georgetown, South Carolina 29442
(843) 546-1130 (telephone)
(843) 546-0726 (facsimile)
Attorney for Third Party Bidder

TABLE OF CONTENTS

Table Of Authorities 3

I. Statement Of Issues On Appeal 5

II. Statement Of The Case 5

III. Statement Of Facts 6

IV. Argument:

A. Petitioner fails to show why this case is not moot. 7

B. It makes no difference who made the motion to dismiss. 8

C. Mr. George is a party to this matter by operation of law. 8

D. The Court of Appeals did not hold that a judicial sale cannot be appealed unless a bond is posted. 9

E. The case law cited by petitioner does not support his position. 10

F. The Master's deed is not void. 11

G. The sale was final when the hammer came down. 13

V. Conclusion 15

TABLE OF AUTHORITIES:

State Cases:

BancOhio Nat. Bank v. Neville, 310 S.C. 323, 426 S.E.2d 773 (1993) 9

Berry v. Zahler, 220 S.C. 86, 66 S.E.2d 459 (1951) 8

Bonham v. Cave, 102 S.C. 308, 86 S.E. 681 (1915) 12

Eastern Savings Bank, FSB v. Sanders, 373 S.C. 349, 644 S.E.2d 802 (S.C.App., 2007) 14

Ex Parte Moore, 345 S.C. 274, 550 S.E. 2d 877 (Ct. App 2001) 11

Ex Parte Moore, 352 S.C. 508, 575 S.E.2d 561 (2003) 11

Ex Parte Qualls, 71 SC 87, 50 SE 646 (1905) 8

Gainey v. Gainey, 279 S.C. 68, 301 S.E.2d 763 (1983) 7

Harrington v. Blackston, 311 S.C. 459, 429 S.E.2d 826 (Ct. App. 1993) 8

Henry v. Blakely, 216 S.C. 13, 56 S.E.2d 581 (1949) 14

Howell v. Gibson, 208 S.C. 19, 37 S.E.2d 271 (1946) 14

McLemore v. Powell, 32 S.C. 582, 10 S.E. 550 (1880) 10

Parrot v. Dickson Hall, 151 S.C. 114, 148 S.E. 704 (1929) 8

Reid v. Reid, 280 S.C. 367, 312 S.E.2d 724 (Ct.App. 1984) 7

Sloan v. Greenville Cnty., 380 S.C. 528, 670 S.E.2d 663 (Ct.App.2009) 7, 10

Spillers v. Clay, 233 S.C. 99, 103 S.E.2d 759 (1958) 14

Other:

Am Jur 2d, "Auctions," §31 13

Am Jur 2d, "Deeds." §163 12

I. STATEMENT OF ISSUES ON APPEAL

A. Does Petitioner address the issue in this appeal?

B. Does it make any difference who makes a motion to dismiss an appeal on the grounds of mootness?

C. Is Mr. George a party to this action?

D. Did the Court of Appeals hold that a judicial sale cannot be appealed unless a bond is posted?

E. Did the Court of Appeals' dismissal conflict with the holding in *McLemore v. Powell*, 32 S.C. 582, 10 S.E. 550 (1880)?

F. Was the sale void or voidable?

G. Was the sale final when the hammer came down?

II. STATEMENT OF THE CASE

The original case here was to foreclose a homeowners' association assessment lien. Service of the Summons, Complaint, and Lis Pendens was properly made on the Defendant, Todd C. Alexander. He subsequently defaulted and an Order of Default was issued. He was notified of the Order of Default, Order of Reference, and the hearing date and place by mail on April 1, 2011. He did not appear at the hearing. The Master's Report and Judgment of Foreclosure and Sale was issued on April 19, 2011. No appeal was taken from the final decree. The sale was duly advertised, and the property was sold at public auction on June 6, 2011. Bidding was

competitive and the sale price was $184,000.00. The successful bidder was William George, acting through his agent Alton Swann. Mr. George complied with the terms of sale by paying the bid amount to the Master. On June 17, 2011, before the Master had issued the deed, Petitioner filed a Motion to Vacate Sale, alleging that the sale price was inadequate; he had a right to redeem at any time until the deed was issued by the Master, and he had been unable to attend to his business because of ill health. A hearing was held on the motion to vacate on June 21, 2011. The Master issued his order denying the motion on August 9, 2011. The Master's deed was recorded August 25, 2011. Notice of Intent to Appeal that order was served on September 8, 2011. No bond was posted to stay the sale. No motion for supercedeas or to stay the sale was made.

On May 25, 2012, the appeal was dismissed by the Court of Appeals on the grounds that the appeal is moot. Alexander filed a Petition for Rehearing that was denied on October 18, 2012. Alexander filed a Petition for a Writ of Certiorari on November 15, 2012. The Petition was granted on April 3, 2014.

III. STATEMENT OF FACTS

Petitioner was properly served and given timely notice of all proceedings. Petitioner ignored this action until after the property was sold. He asserts no irregularity on the part of any party or the Master. The Petitioner does not raise any

issue of lack of jurisdiction or notice and has not contested the validity of the foreclosure proceedings in any way.

The Petitioner did not request that the Master stay the issuance of his deed while the case was appealed in the event the Master denied the motion to vacate. While Petitioner may have had health problems, nothing has been presented that shows he was unable to look after his business for more than eight months while this action was pending.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Petitioner fails to show why this case is not moot.

In his brief, Petitioner fails to make any showing that this Court can grant effective relief. Mootness arises when some intervening event occurs making it impossible for the reviewing court to grant effectual relief. *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct.App.2009). Here, the Master's deed was issued after the Master denied Petitioner's motion to vacate the *judicial sale.* Petitioner has never sought to have the deed set aside. Appellate may not predicate error on the failure of the trial court to grant relief which is not prayed for in his pleadings. *Gainey v. Gainey*, 279 S.C. 68, 301 S.E.2d 763 (1983); *Reid v. Reid*, 280 S.C. 367, 312 S.E.2d 724 (Ct.App. 1984). A decision that the sale was invalid will have no effect on the deed.

B. It makes no difference who made the motion to dismiss.

Petitioner appeals on the grounds that the Court of Appeals erred by granting a motion to dismiss made by someone not a party to the action, i.e., Mr. George. Who makes the motion is irrelevant. The Court may dismiss a case on grounds of mootness on its own motion: "The rule is well established that review proceeding are not allowed for the purpose of settling abstract questions. An appeal or error proceeding may be dismissed by the court either on its own motion or that of either party. An appellate court may dismiss an appeal or error proceeding on its own motion where it appears from the record that the court is without jurisdiction or that the judgment sought to be reviewed is not final, among numerous other reasons, even though no objection is raised by the opposite party." *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) (internal citations omitted)

Furthermore, it appears that the Court of Appeals dismissed the appeal on its own since the order does not refer in any way to Mr. George's motion.

C. Mr. George is a party to this matter by operation of law.

It well settled that the purchaser at a judicial sale becomes a party to the action. *Ex Parte Qualls*, 71 SC 87, 50 SE 646 (1905); *Parrot v. Dickson Hall*, 151 S.C. 114, 148 S.E. 704 (1929); *Harrington v. Blackston,* 311 S.C. 459, 429 S.E.2d 826 (Ct.

App. 1993). Mr. George became a party automatically upon being the successful bidder.

The burden is on the Petitioner to identify and join all indispensible and necessary parties. *BancOhio Nat. Bank v. Neville*, 310 S.C. 323, 426 S.E.2d 773, (1993). Mr. George complied with the terms of the Order of Sale and Notice of Sale. He did everything that the law required of him. He is a party by operation of law, regardless of what names appear in the caption . It was the obligation of the Petitioner to amend the caption to name George in all subsequent filings.

The Appellant properly served the original motion on the purchaser, and has treated the purchaser as a party throughout this litigation. He should not now be allowed to claim Mr. George is not properly before the Court.

Petitioner is attempting to hoist himself on his own petard. If George is not a party, then the sale cannot be attacked in this litigation, as he is an indispensable party to any to any litigation regarding its validity.

D. The court of appeals did not hold that a judicial sale cannot be appealed unless a bond is posted.

Petitioner misconstrues the Court of Appeal's order. The rule is that judicial sales are not stayed by an appeal unless a bond is posted. A party is free to appeal a

foreclosure sale without posting a bond or obtaining a supercedeas. A party is free to request that the Master or other selling official withhold the issuance of the deed until after the time for filing an appeal has run. However, a party who fails to take reasonable steps to protect his interests does so at the risk of the matter becoming mooted by the issuance of the deed. If the result were otherwise, the rule that a bond be posted to stay the effect of the judgment is rendered meaningless.

The Court of Appeals merely applied the standard rules concerning mootness. A court does not concern itself with moot or speculative questions. An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists. A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief. *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct.App.2009). The execution, delivery, and recording of the deed rendered this appeal moot.

E. The case law cited by petitioner does not support his position.

Petitioner cites several cases as supporting his contention that issuance of a deed does not render an appeal moot. None of the cases so cited support Petitioner's position. In *McLemore v. Powell,* 32 S.C. 582, 10 S.E. 550 (1880), the issue was

whether the failure to post a bond required the appeal to be dismissed. No deed had been issued in that case. The ruling was simply that failing to post a bond did not require the appeal to be dismissed. *Ex Parte Moore*, 345 S.C. 274, 550 S.E. 2d 877 (Ct. App 2001), was reversed by the Supreme Court in *Ex Parte Moore,* 352 S.C. 508, 575 S.E.2d 561 (2003). Therefore, it has no precedential value. Even if it did, it is distinguishable from this case on several points. First, Petitioner does not contend the judicial sale was void, merely voidable. (See Petitioner's Initial Brief.) Secondly, in *Ex Parte Moore,* the Master's deed was issued several months *after* the appeal was filed, not before the appeal, as is the case here. Thirdly, if the grounds asserted in this appeal are sufficient to render a foreclosure sale void, no sale will ever be safe from attack and all bids at foreclosure sales will be chilled.

F. The master's deed is not void.

Petitioner does not contend the Master's deed is void. The grounds asserted by Petitioner are that he redeemed the property before the deed was issued, the deed should be set aside because the consideration was too little, and he had health problems that prevented his protecting his interests. This is on its face insufficient to set the deed aside as either void or voidable.

"No doubt the rule is that inadequacy of price unless it is so gross as to shock the conscience, or accompanied by other circumstances warranting the interference of the court, is not enough to move the court to set aside a sale fairly made. 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." *Bonham v. Cave*, 102 S.C. 308, 86 S.E. 681, 682 (1915).

When used in its correct sense, the term "voidable," with regard to a deed, has much the same meaning that it has in the law of contracts—that is, as meaning a writing that is both operative to convey the property and creative of contractual obligations unless and until set aside by the court. A voidable deed is capable of being either avoided or confirmed. The word "void," on the other hand, implies that the deed is invalid in law for any purpose whatsoever, such as a deed to effectuate a prohibited transaction. A voidable deed must be attacked, if at all, directly, but a deed that is void may be collaterally attacked by anyone whose interest is adversely affected by it. The recording of a void deed is legally insufficient to create a legal title and affords no protection to those claiming under it. Am Jur 2d, "Deeds." §163.

There is no evidence, assertion, or argument that the Master or any bidder did anything inappropriately in this matter. Therefore, at best, the deed is merely voidable. Since Petitioner again failed to protect his interests by moving to stay the issuance of the deed or posting a bond, the issuance of the deed renders this matter moot.

G. The sale was final when the hammer came down.

The general law regarding auction sales is clear that sales are final when the auctioneer accepts the last highest bid.

> The acceptance of a bid at auction is denoted by the fall of the hammer or by any other audible or visible means signifying to the bidder that he or she is entitled to the property on paying the amount of the bid according to the terms of the sale. The most usual mode is by the fall of the hammer, and from this method are derived the expressions that the property is "struck off," or "knocked off," or "knocked down" to the bidder. However, certain expressions such as "going, going, gone." or "sold" may also be used by the auctioneer to indicate acceptance of the last bid received. Even if an auction is with reserve (and all auctions are presumed to be with reserve unless they are expressly stated to be without reserve), the seller must exercise his or her right to withdraw the property from sale before the auctioneer accepts the high bid by letting the hammer fall; immediately after the hammer falls, an irrevocable contract is formed. Am Jur 2d "Auctions," §31.

This Respondent has been unable to find any statute or case in S.C. that states exactly when the right of redemption ceases in a foreclosure action. "A judicial sale

should not be set aside except for cogent reasons. The purpose of the law and of the proceedings in which a sale has been decreed is that it shall be final." *Spillers v. Clay,* 233 S.C. 99, 104, 103 S.E.2d 759, 761-62 (1958). "As has been said time and again in cases involving the setting aside of judicial sales, it is the policy of the Courts to uphold such sales when regularly made, and when it can be done without violating principle or doing injustice...." *Henry v. Blakely,* 216 S.C. 13, 18, 56 S.E.2d 581, 583 (1949). Our courts zealously insure judicial sales be openly and freely conducted and nothing be allowed to chill the bidding. *Howell v. Gibson,* 208 S.C. 19, 31, 37 S.E.2d 271, 276 (1946). See also *Eastern Savings Bank, FSB v. Sanders*, 373 S.C. 349, 355, 644 S.E.2d 802, 806 (S.C.App., 2007).

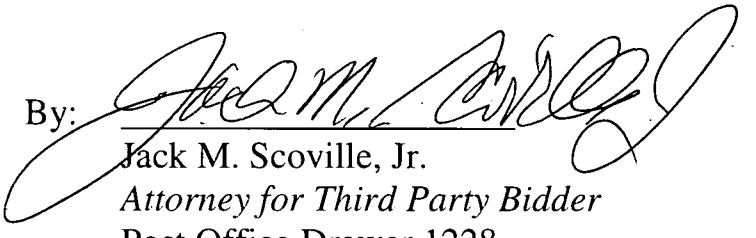
Common sense and the need to encourage judicial sales indicate that, at the latest, the right to redeem ceases at the fall of the hammer at the judicial sale. It is public policy to encourage judicial sales. To allow a mortgagor to wait to redeem until the foreclosure deed is actually recorded will chill sales. Most purchasers at judicial sales pay a deposit and have twenty or thirty days to comply with their bid. Many have to finance the purchase. All should have the title to the property examined. This costs time and money, which will be wasted if the mortgagor redeems before the deed is issued. Once the hammer falls, the right to redeem ceases.

V. CONCLUSION

Petitioner has only himself to blame for his situation. He ignored the process of the court, ignored the notices to appear at the hearing, ignored the sale, and failed to move expeditiously to obtain a stay of the sale. To cap it all off, Petitioner failed to name the bidder as a party to the subsequent proceedings.

On the other hand, Mr. George has done everything required of him by the law. The Court of Appeals' dismissal should be affirmed.

Jack M. Scoville, Jr., P.A.

By: 

Jack M. Scoville, Jr.
Attorney for Third Party Bidder
Post Office Drawer 1228
1001Front Street
Georgetown, South Carolina 29442
(843) 546-1130 (phone)
(843) 546-0726 (fax)
Email: scorac@aol.com

Date: July 15, 2014

THE SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Joe M. Crosby, Master-in-Equity
Trial Court Case Number 2010 CP 22 1583
Appellate Case No. 2012 213400

RECEIVED
JUL 18 2014
S.C. Supreme Court

Wachesaw Plantation East Community Services Association, Inc.,

Respondent,

v.

Todd C. Alexander,

Petitioner.

PROOF OF SERVICE

I Jack M. Scoville, Jr. hereby certify that on July 15, 2014, I served a copy of the ***Brief of William George, Third Party Bidder*** on opposing counsel via the United States Mail, postage pre-paid, and addressed as follows:

Hal L. Beverly, Jr., Esquire
McCutchen, Mumford, Vaught,
O'Dea & Geddie, P.A.
4610 Oleander Drive, Suite 203
Myrtle Beach, SC 29577

Charles T. Smith, Esquire
Grimes & Smith
1112 Highmarket Street
Myrtle Beach, SC 29577

Jack M. Scoville, Jr.
Post Office Drawer 1228
Georgetown, South Carolina 29442
(843) 546-1130 (telephone)
(843) 546-0726 (facsimile)
Attorney for Third Party Bidder

THE SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Joe M. Crosby, Master-in-Equity
Trial Court Case Number 2010 CP 22 1583
Appellate Case No. 2012 213400

Wachesaw Plantation East Community Services Association, Inc.,

Respondent,

v.

Todd C. Alexander,

Petitioner.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Brief of William George, Third Party Bidder in the above-captioned matter complies with Rule 211(b).

Jack M. Scoville, Jr.
1001 Front Street
Post Office Box 1228
Georgetown, South Carolina
Telephone 843-546-1130
Attorney for Third Party Bidder