THE STATE OF SOUTH CAROLINA
In The 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.

REPLY BRIEF

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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 money claimed. (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 ground 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.

William George's Brief asserts: "The successful bidder [at the foreclosure sale] was William George, acting through his agent Alton Swan." (William George's Brief p. 6) No citation to the record is offered in support of this claim. Jerry Calahan submitted a Memorandum of Third Party Bidder in opposition to Alexander's Motion to Vacate Stay stating that he was the successful bidder at the foreclosure sale. (Memorandum of Third Party Bidder, R. p. 17) The Master's Order Denying Motion found that Jerry Calahan was the successful bidder at the foreclosure sale. (Order Denying Motion, R. p. 22)

William George's Brief implies that the successful bidder complied with the terms of the sale by paying the bid amount to the Master before Alexander filed his Motion to Vacate Stay. (William George's Brief p. 6) No citation to the record is offered in support of this suggestion. The Motion to Vacate Sale was filed June 17, 2011. (Motion to Vacate Stay, R. p. 1-2) Compliance with the bid did not occur until June 24, 2011, seven days after the motion was filed. (Smith Affidavit p. 1, R. p. 101)

William George's Brief asserts: "Petitioner was properly served and given timely notice of all proceedings." (William George's Brief p. 6) No citation to the record is offered in support of this claim. Alexander did not know that a foreclosure decree had been issued or that the property had been advertised for sale. (Alexander's Affidavit p. 4, R. p. 99) Alexander had no knowledge of the foreclosure sale until June 7, 2011, the day after the sale. (Alexander Affidavit p. 4, R. p. 99)

William George's Brief asserts: "The Petitioner has not contested the validity of the foreclosure in any way." (William George's Brief p. 6-7) No citation to the record is offered in support of this claim. Alexander has contested the validity of the foreclosure. Alexander moved to vacate the foreclosure sale on the grounds:

1. The sale should be vacated because the sale price was inadequate and the sale was accompanied by other factors warranting the interference of the court.
2. The sale should be vacated to avoid a forfeiture.
3. The sale should be vacated to avoid unjust enrichment of the third party bidder.
4. The sale should be vacated because Todd Alexander timely redeemed the property.

(Memorandum in Support of Motion to Vacate Sale, R. p. 3-15)

William George's Brief asserts: "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." (William George's Brief p. 7) No citation to the record is offered in support of this claim. Alexander, a resident of Pennsylvania, 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 was trivial compared to his equity in the house and he believed he could easily resolve the matter when his health returned to a more stable condition. (Alexander Affidavit p.3, R. p. 98) Alllexander continued to pay the current the current assessments and had no knowledge of the foreclosure decree or sale until the day after the sale. (Alexander Affidavit p. 4, R. p. 99) He promptly tendered payment in full to the homeowners association and offered to

reimburse all reasonable expenses incurred by the high bidder at the sale. (Motion to Vacate, R. p. 1)

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) this Court stated, ". . . 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.

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's Brief responds to *Condon v. State, supra, Ex parte South Carolina Department of Motor Vehicles, supra*, and Rule 240, SCACR, by ignoring the decisions and the rule. Neither the decisions nor the rule are mentioned in the brief.

William George's Brief instead argues: "It makes no difference who made the motion to dismiss." (William George's Brief p. 8) No authority is cited for this extraordinary claim. An important reason for the Court to reject this extraordinary claim is that a motion to dismiss an appeal automatically stays the time limits for perfecting the appeal until the motion is decided. Rule 240(b), SCACR. If any person or entity can stop consideration of the merits of any appeal for any purpose without becoming a party or submitting to the jurisdiction of the court, then delay, uncertainty, confusion and mischief will be the inevitable results.

William George's Brief alternatively argues: "Mr. George became a party automatically upon being the successful bidder." (William George's Brief p. 9) In adopting the doctrine of judicial estoppel, this Court observed in *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 251-52, 489 S.E.2d 472, 477 (1997):

> In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

Jerry Calahan submitted a Memorandum of Third Party Bidder to the Master stating that the successful bidder was Jerry Calahan. (Memorandum of Third Party Bidder, R. p. 17) The Master's Order Denying Motion found that successful bidder was Jerry Callahan. (Order Denying Motion, R. p. 22) There appears to be some privity between Jerry Callahan and William George but the nature of that relationship has been hidden and two totally inconsistent statements concerning the identity of the successful bidder have been asserted to the courts.

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 was told that Jerry Callahan was the high bidder at the foreclosure sale. 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. William George should now be judicially estoppel from asserting he became a party automatically upon being the successful bidder.

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 the successful bidder 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's Brief acknowledges: "A party is free to appeal a foreclosure sale without posting a bond or obtaining a supersedeas." (William George's Brief p. 10)

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*, 32 S.C. 582, 10 S.E. 550 (1889) - 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).

William George's Brief attempts to distinguish *McLemore v. Powell*, *supra*, by asserting: "No deed had been issued in that case." (William George's Brief p. 11) The assertion is not correct. The sale had been made. The Notes of Causes Decided During the Period Comprised in this Volume, and Not Reported in Full, 10 S.C. 550 (1889) states:

> No. 2501. McLemore v. Powell. November Term, 1889.
> Motion to dismiss appeal from a decree of foreclosure, the ground of the motion being that no bond had been filed to stay the sale, and the sale had been made. On November 20, 1889, the motion was refused per curiam, and the appeal was then heard.

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.

4. Petitioner's appeal has merit.

The merits of this appeal are not properly before the Court because William George's Motion to Dismiss stayed the proceedings before the briefs and transcript of record were filed. Nonetheless a substantial part of William George's Brief is dedicated to criticizing Alexander and to asserting that the appeal lacks merit.

Argument F in William George's Brief asserts "The Master's deed is not void." (William George's Brief p. 11) The assertion is an attempt to justify dismissal of the appeal by claiming the Master's deed is merely voidable and not void. (William George's Brief p. 13) This is a distinction without a difference in the present action. This Court, and the Court of Appeals, have the power to vacate judicial sales in appropriate cases and have the ability to grant effective relief to Alexander

Argument G in William George's Brief asserts: "The sale was final when the hammer came down." (William George's Brief p. 13) The assertion is an attempt to justify dismissal of the appeal by claiming Alexander's right to redeem his property was extinguished on salesday at the conclusion of bidding. However, William George's Brief concedes that he has been unable to find any statute or case in South Carolina that supports his assertion. (William George's Brief p. 13)

In fact, a property owner's rights and interests pass to the purchaser when the terms of the judicial sale have been fulfilled and the officer making the sale has executed a conveyance to the purchaser. S. C. Code §15-39-830. Alexander exercised his equity of redemption by tender of payment in full to the homeowners' association's attorney before the

high bidder complied with the terms of the sale. A judicial sale is not complete until a deed has been issued. *Goethe v. Cleland*, 323 S.C. 50, 55, 448 S.E.2d 574, 576 (1994)

The decree issued in this action is consistent with the pertinent statutes and case law. Paragraph nine of the decree provides: "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each Defendant(s) named herein and all persons whosoever claiming under him, them or it be forever barred and foreclosed of all right, title, interest, and equity of redemption in said mortgaged premises so sold, or any part thereof." (Initial Brief p. 15, R. p. 80) The decree recognizes that high bidders do not always comply with the terms of the sale and provides that should compliance not be made within thirty (30) days after the date of sale, then the Master may advertise the premises for sale on some subsequent salesday, at the risk of the highest bidder, from time to time thereafter until full compliance shall be secured. The decree does not state that a high bidder receives an immediate right to the property when the hammer comes down on salesday. Only upon completion of the sale does the property owner lose his right, title, interest and equity of redemption in the property sold.

The sale of Alexander's property was not complete and his equity of redemption was not barred when he exercised his right and equity of redemption.

CONCLUSION

McLemore v. Powell, 32 S.C. 582, 10 S.E. 550 (1889) 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,

July 25, 2014

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PROOF OF SERVICE

I certify that I served the Petitioner's Reply Brief on Wachesaw Plantation East Community Services Association, Inc. by depositing a copy in the United States Mail, postage prepaid, on July 25, 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 July 25, 2014 addressed to his attorney of record, Jack M. Scoville, Jr., Post Office Drawer 1228, Georgetown, South Carolina 29442.

July 25, 2014

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