

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S Jackson Kimball, Special Circuit Court Judge

Case No 2007-CP-46-4305

SunTrust Mortgage, Inc , Respondent,

v

Mark Ostendorff,Appellant

RETURN TO DISMISS

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STATEMENT OF THE CASE

This appeal is for the foreclosure hearing in which Appellant Ostendorff did not attend as he was never informed of the hearing before it was held

An earlier existing appeal is in progress from Ostendorff's counterclaim that was dismissed under summary judgment by the same Lower Court

ARGUMENTS

1 Appellant Ostendorff was not negligent in not appearing in the foreclosure hearing

Ostendorff was never notified of the hearing in advance and had no way of knowing a hearing was even going to be heard

An affidavit by Ostendorff was provided to this Court in his Initial Brief attesting that he had no notice of the hearing, nor notice of sale until after the fact through his own diligence in which he filed an appeal and a Chapter 7 Petition to stop the sale of the house just days before the scheduled sale

A Rule 60 motion does not stay or toll the time for appeal Otten v. Otten, 287 S C 166, 337 S E 2d 207 (1985) The house would have been sold long before a motion would have been heard . Any property bought at auction under legal process does not have to be returned to the original owner

If relief would have been sought through a motion under Rule 60, this relief is within the "sound discretion of the judge " Coleman v Dunlop , 306 S C 4r91, 496, 413 S E 15, 17 (1992) Considering the trial judge had already denied Ostendorff 's motion to compel regarding SunTrust's witnesses and addresses of former and present employees that Ostendorff planned to subpoena, expecting a motion to prevent the house not to be sold at auction would only be wishful thinking

All motions under Rule 60 (b) must be made within a reasonable time That reasonableness is up to the discretion of the trial court Considering the above mentioned motion by Ostendorff was originally considered "untimely" by the same trial judge, any hope of being considered timely

would again be wishful thinking

Section 14-3-330 provides

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases , and shall review upon appeal

(2) An order affecting a substantial right made in an action when such order

(a) in affect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action

Rule 60 (b)(1) applies not only to default judgments, but to any final judgment Goodson v American Bankers Ins Co , 295 S C 400 , 368, S E 2d 687 (Ct Appl 1988)

Rule 201(a) SCARC, provides “ Appeal may be taken , as provided by law , from any final judgment or appealable order ”

No reasonable person would believe that Ostendorff knew of the hearing in advance

Had Ostendorff been at the foreclosure, ne could have easily impeached Suntrust’s witness as to validity of the debt as SunTrust is not the real party in interest Had SunTrust provided Ostendorff with addresses of present and past employees as requested under discovery, Ostendorff would have subpoenaed them to prove to the court that SunTrust was not the real party in interest

2 This Court should reverse the Lower Courts order for foreclosure where the Lower Court

entered an order granting Respondent's motion for summary judgment and finding that Appellant owed the debt to Respondent was in default and where the this Court has already affirmed that prior decision

The Lower Court's granting Respondent's motion for summary judgment is in appeal with the SC Supreme Court

The motion for summary judgment was Ostendorff's compulsory counterclaim, not any debt that Ostendorff may or may not have owed to SunTrust.

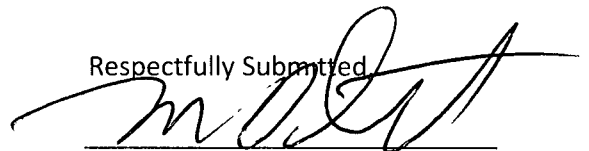
Generally an appellate court may reverse the judgment of a lower court when there is some error of law or when factual conclusions are without evidentiary support *Tolk v Weinstein*, 265 S C 546, S E 2d 239 (1975) The lower court's order for summary judgment where not based on true facts presented at the trial

CONCLUSION

For the reasons stated above, Appellant requests that this Court deny Respondent's motion to dismiss Appellant's appeal

August 16, 2014

Respectfully Submitted



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Certificate of Service

I, Mark Ostendorff, certify that I placed a copy of Appellant's Return To Motion of Respondent's Motion to Dismiss Appeal in the US Postal Service, with proper postage paid to SunTrust's attorney at

Tatum Law Firm, Brian S Tatum, PO Box 11250, Charlotte , NC 28220

August 18, 2014



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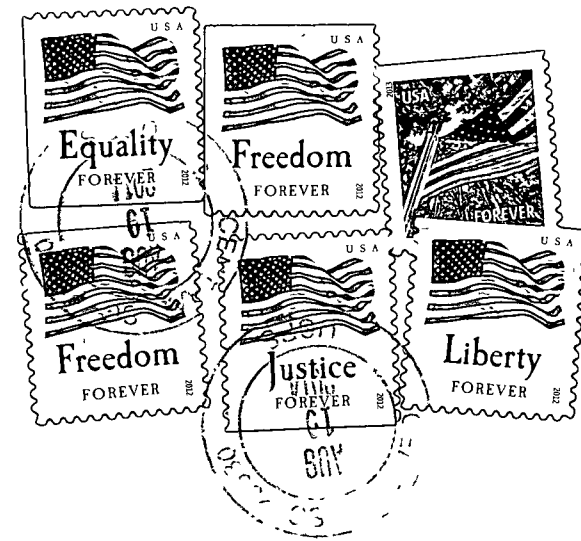
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