

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 DEUTSCHE BANK,)
)
 Plaintiff,)
)
 vs.)
)
 GREGORY A. CARR; COASTALSTATES)
 BANK, ET. AL.,)
)
 Defendants.)
 _____)

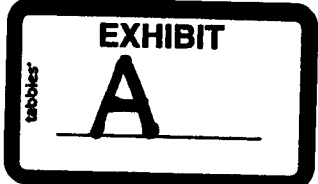
IN THE COURT OF COMMON PLEAS
 FOURTEENTH JUDICIAL COURT
 CIVIL ACTION NO.: 2013-CP-07-249

**ORDER GRANTING MOTION TO
 ALTER OR AMEND JUDGMENT
 AND FOR RELIEF FROM JUDGMENT**

This matter comes before me upon CoastalStates Bank’s (“CSB”) Motion to Alter or Amend Judgment or for Relief from Judgment, dated October 6, 2014. A hearing was held on November 13, 2014 at 9:30 a.m. Appearing on behalf of the Plaintiff, Deutsche Bank, was Mathew E. Tillman. Appearing on behalf of CSB was Russell P. Patterson. Each side presented a memorandum of law in support of their position. CSB submitted the Affidavit of Russell P. Patterson. CSB, the second mortgage holder, is seeking to require the Plaintiff to re-advertise and re-sell this property since the Plaintiff never served any of the Defendants with the Notice of Sale. For the reasons discussed below, this Court grants said motion, with special conditions as noted.

FACTUAL BACKGROUND

1. The Plaintiff, Deutsche Bank National Trust Company (“Deutsche”), initiated this foreclosure on a home located at 21 Oyster Landing Road, Sea Pines Plantation, on January 30, 2013 owned by Gregorv A. Carr and Christine M. Carr (“Carr”). CSB, which held a second mortgage in the amount of \$350,000, was named a party. CSB timely filed an Answer on February 14, 2013 requesting the Court protect its second mortgage interest.



2. The final foreclosure hearing was held on July 10, 2014 at which time this Court issued an Order and Judgment of Foreclosure and Sale (“Decree”), awarding a judgment to Deutsche in the amount of \$757,029.36 against Carr.

3. The Decree did not provide specific information as to a sales date. A separate Notice of Sale was signed by the Court providing for the sale of the property on Monday, August 4, 2014. Deutsche filed both the Decree and Notice of Sale with the Clerk of Court, but only served the Decree on the Defendants. Deutsche never served the Notice of Sale on any of the Defendants. Deutsche was the successful bidder at the August 4, 2014 sale at \$725,000, bidding \$32,029.36 below its judgment amount.

4. CSB was not served with a copy of the Notice of Sale and therefore did not appear to protect its interest.

LEGAL DISCUSSION

A) Notice of Sale was Required to be Served on CSB

Deutsche does not dispute that it failed to serve CSB. Instead, it takes the position that it was not required to serve said parties.

Rule 5(a) SCRCP clearly requires the service on all parties of record all orders, pleadings, written notices, and other similar papers. Said rule reads as follows:

“(a) **Service: When Required.** Unless otherwise ordered by the court because of numerous defendants or other reasons, all (1) written orders; (2) pleadings subsequent to the original summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints; *** (4) written notices; *** and (11) other similar papers shall be served upon each of the parties of record.” (Emphasis added)

Unquestionably, the Notice of Sale is a “pleading” in this matter, as well as a “written notice”, thus subsections (2) and (4) apply. Since it is signed by a Judge, and sets forth the precise terms, conditions and provisions of the sale, some of which are not included in the Decree of Foreclosure¹, it is also a written “order” within subsection (1). The conclusion the Notice of Sale is in essence an Order is further supported by reviewing Rule 71(b) SCRPC, which requires that the Decree of Foreclosure must provide the time and location of the sale. The Decree in this case provided no information as to the time and location of the sale. That information was only included in the Notice of Sale. It is clear the two documents must be read together as one Order in order to comply with Rule 71(b), SCRPC. Deutsche asserts in its Memorandum of Law that these rules of civil procedure are overridden by the procedural statutes governing judicial sales. The South Carolina Legislature in its enabling legislation for the SCRPC stated otherwise, providing that if there was a conflict between a procedural statute and the rules the rules should control. Act No. 100, §3, 1985 S. C. Acts 277.

6. Assuming, *arguendo*, the Notice of Sale is not expressly included in subsections (1), (2) or (4) of Rule 5 SCRPC (i.e., not a pleading, notice or order), it is certainly included under the catch-all of “other similar paper” under subsection 11. The Notice of Sale was filed with the Clerk of Court, just like all other pleadings, except discovery documents. It certainly provides a critical notice of an important event, required by law. Finally, it is signed by a Judge, just like any Order, and contains numerous restrictions and conditions which control the sale. Thus, it has many of the same elements and characteristics as the documents listed in subsections 5(a) (1) through 5(a) (10) SCRPC.

7.

¹ The date and time of sale are not included in the Decree of Foreclosure.

8. South Carolina courts have strictly enforced the provisions of Rule 5(a) SCRC requiring service of documents similar to a Notice of Sale. See: Wiggins v. Todd, 296 S.C. 432, 373 S.E.2d 704 (1988) – Under former S.C.R.Civ.P. 5(a), every written notice shall be served upon the parties, including the notice of a damages hearing; Allen v. South Carolina Alcoholic Beverage Control, 321 S.C. 188, 467 S.E.2d. 450 (1996) – Under Rule 5(a) SCRC, counsel is required to serve all proposed orders on opposing parties.

9. The provisions of Rule 5(a), Federal Rules of Civil Procedure are virtually identical to Rule 5(a) SCRC. The Federal Rule reads as follows:

“(a) **Service: When Required.**

(1) ***In General.*** Unless these rules provide otherwise, each of the following papers must be served on every party:

- (A) an order stating that service is required;
- (B) a pleading filed after the original complaint, . . . ;
- (C) ***
- (D) A written motion, except one that may be heard ex parte;
and
- (E) a written notice, appearance, demand, or offer of judgment,
or any similar paper.” (emphasis added)

10. As noted in 4(B) Charles Alan Wright and Arthur Miller, Fed. Prac. & Proc. § 1143 (3rd Edition), the requirements of service on parties of pleadings, orders, notices, and other similar papers under Rule 5(a) FRCP had been given very broad interpretation by the courts so that all parties receive notice of each step taken in an action.

11. Section Rule 5(a)(1)(E) FRCP, setting forth the requirement for service of “similar papers” is “. . . an attempt by the drafters to avoid a restrictive interpretation of the rule’s specific list of papers, which is not intended to be exhaustive. In fact, these residuary and catch-all words suggest an expansive scope of application for the service requirement and it is

not surprising it has been construed to extend to the service of written notices in such diverse matters as bankruptcy, contempt proceedings, grand jury investigations, and divorce cases in the District of Columbia.” *Id.*, § 1143.

12. Other jurisdictions have come to the conclusion a Notice of Sale must be personally served in foreclosure actions. In Principal Residential Mortgage, Inc. v. Nash, 2001 N.D. 21, 606 N. W. 2d 120 (2000), a North Dakota bank did not provide notice of the foreclosure sale to an owner. The Court cited Rule 5, N.D. R. Civ.P., requiring service on all parties of all pleadings, orders, written notices and other papers, a rule almost identical to our Rule 5(a) SCRCP, and overturned the sale due to this lack of notice. The Court rejected the arguments of the bank that the notice of sale complied with various statutory requirements. The Court further stated that the owner had a critical, important interest in receiving said notice to protect her interest in the property, attending the sale, and possibly bidding, just like the important interest held by CSB.

13. The Court in Nash also held the submission by bank’s counsel of the proposed order confirming the sale, without notice to the owner, violated the same state court Rule 5 listed above. As in Nash, Deutsche in this case did not copy CSB when it submitted the proposed Order Confirming Sale, the Report of Sale or the dec i, as required by Rule 5(a) SCRCP and the due process rights of CSB. Other courts have interpreted similar rules of civil procedure as requiring notice of a sale be directly served on all parties. In Central Trust Co. v. Jensen, 67 Ohio St.3d 140, 616 N.E.2d 873(1993), the Court in Ohio, which has service and foreclosure procedural rules similar to both North Dakota and South Carolina, found notice only by publication of a known party not sufficient under a due process analysis. See Also: Federal Deposit Ins. Corp. v. Duerkson, 1991 Ok Civ App 39, 810 P.2d 1308 (Okl. App. 1991).

14. Not only do the above authorities lead to the conclusion that the Notice of Sale (and all other pleadings not served) must be served on all parties, common sense dictates the same result. On many occasions, the foreclosing Plaintiff, through agreement with the property owner, or for other reasons, delays for a substantial period of time when a sale is actually to take place after the Decree is executed. Without service of the Notice of Sale, an interested party, such as CSB which holds a second mortgage, would have no way to know when the sale was being conducted unless it attempts to read through the hundreds of Notices of Sale published monthly in the local paper.

15. Deutsche relies heavily on Peoples Federal Savings & Loan Ass'n v. Graham, 291 S.C. 178, 352 S.E2d 511 (Ct. App. 1987) for its position that the Notice of Sale does not need to be served. A careful review of said decision leads to the conclusion is it not applicable to the facts in this case. In Peoples, the bank commenced a foreclosure, naming two judgment lienholders as additional defendants. The Decree of Foreclosure specially provided when the sale was to be conducted. The Notice of Sale was not served on the defendants. At the sale, Mr. Bartels, an innocent third party, was the successful bidder. The court held the two judgment lien holders did not need to be served when their rights were balanced against the interest and rights of the innocent third party purchaser. The Court stated at follows on page 181:

“While failure to give personal notice to these defendants is an irregularity which the court does not encourage, it is not the sort of unfairness which will void the sale to Mr. Bartels”

16. The Court clearly balanced the equities of the parties, the third party lienors, against the innocent purchaser, Mr. Bartels and concluded the judgment lienholders should bear any resulting loss due to the admitted defects in the sale process. In this case, there is no

innocent purchaser, only Deutsche, which did not serve the Notice of Sale on the owners or CSB, who was very likely to bid given the substantial equity in the property.

17. Peoples is also distinguishable since the Decree in that case specifically provided when the sale was to be held. In this case, the subject Decree contains absolutely no information as to when the sale is to occur. Thus, receipt by CSB of the Decree provided none of this important, critical information. In addition, the parties in Peoples never raised the arguments set forth above as to the requirements of Rules 5(a), 71 SCRCP, or due process requirements. Finally, the defendants who did not receive the notice of sale in Peoples were mere judgment lienholders, not a lender who specially entered into a business transaction with an owner intentionally relying on the equity in the property beyond the first mortgage. Certainly CSB's interest is deserving of a higher level of scrutiny and protection as to compliance with critical court rules than the judgment lienholders in Peoples.

B) CSB's Motion was Timely under Rule 59(c) SCRCP

18. Deutsche asserts that CSB's motion is untimely under Rule 59(e) SCRCP. Said rule requires a motion to alter or amend a judgment to be filed not later than ten (10) days after written notice of the disputed order. In this case, CSB never received copies of any such order as Deutsche did not serve CSB with same. As noted above, that the Master's Deed, Report on Sale and Disbursements and Order Confirming Sale were all sent directly to the Court, with no copies sent to opposing counsel. Within five (5) days of the learning of the existence of said documents, CSB filed the subject motion (Aff. Patterson, § 9). Under the above facts, the motion was timely filed.

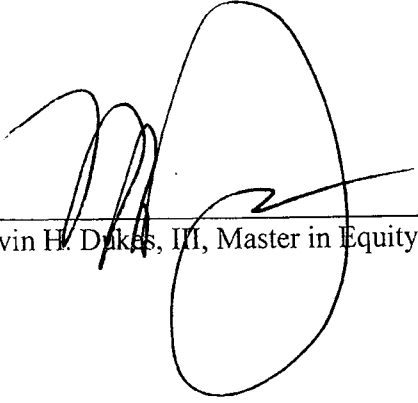
CONCLUSION

The Court's goal is to allow CSB the opportunity to bid on the property as if it would have been present at the sale and been given an opportunity to make an upset bid. In this fashion, there is no need to re-advertise and re-sell the property. The Court thus provides the following two options which Plaintiff may elect to proceed:

1. Deutsche to convey the Subject Property to CSB – The Plaintiff will provide within ten (10) days of this Order an amount it will convey by limited warranty deed, the Subject Property to CSB (“Transfer Price”), based on what Plaintiff would have received if CSB made an upset bid on August 4, 2014. If CSB accepts said figure, it shall pay same within fourteen (14) days of receipt of the Transfer Price and the transfer of the Subject Property will be completed within said fourteen (14) day period.

2. Judicial Re-Sale of the Subject Property – If Plaintiff does not provide a Transfer Price, or provides a Transfer Price that is not acceptable to CSB, I find and conclude the Master's Sale of August 4, 2014 is defective and invalid for the reasons described above and the Master's Title recorded at Book 3343 at Page 2640 at the Beaufort County Register of Deeds is void and invalid. The Subject Property shall be re-advertised and re-sold, pursuant to the terms of the Master in Equity's Order and Judgment of Foreclosure and Sale, dated July 10, 2014.

AND IT IS SO ORDERED.



Marvin H. Dukas, III, Master in Equity

Beaufort, South Carolina
November 8, 2014

SEEN.

Matthew E. Tillman by Russell P. Patterson
12/3/14

Matthew E. Tillman / Date
Attorney for Deutsche National

SEEN.

Russell P. Patterson
12/3/14

Russell P. Patterson / Date
Attorney for the Defendant,
Coastal States Bank

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
The Honorable Marvin H. Dukes
Case No.: 2013-CP-07-00249

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR THE WAMU MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2004-AR3,

Plaintiffs,

v.

GREGORY A. CARR; CHRISTINE M. CARR; OYSTER
LANDING HOMEOWNER'S ASSOCIATION, INC.,
ASSOCIATION OF SEA PINES PLANTATION
PROPERTY OWNERS, INC., AND THE ADVISORY
BOARD, AND COASTALSTATES BANK,

Defendants.


PROOF OF SERVICE

I do hereby certify that on January 8, 2015, I served the *Notice of Appeal* on Respondents by depositing a copy of it in the United States Mail, postage prepaid, to:

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