

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

APR 14 2015

Joseph M. Strickland
Master in Equity

S.C. Supreme Court

Civil Action Nos. 2011-CP-40-6317 and 2011-CP-40-6318
Unpublished Opinion No. 2014-UP-435 (S.C. Ct. App. filed Dec. 3, 2014)
Appellate Case No. 2015-000352

SCBT, N.A.Respondent,

v.

Sand Dollar 31, LLC; Rhonda
Meisner.....Defendants,

Of Whom Rhonda Meisner is
the.....Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Respondent SCBT, N.A.¹ (“SCBT”) opposes Petitioner Rhonda Meisner’s (“Meisner”) Petition for a Writ of Certiorari on the following grounds:

QUESTIONS PRESENTED FOR REVIEW

- I. Do any special and important reasons exist for the Court to issue a Writ of Certiorari?**
- II. Does Meisner’s Petition for a Writ of Certiorari improperly include several questions that were not raised both in the Court of Appeals and in her Petition for Rehearing?**
- III. Is Meisner’s “capacity” defense preserved for review where she raised it for the first time in the Court of Appeals?**
- IV. Did the Court of Appeals err in affirming the Master’s Order Denying Defendants’ Motion to Alter or Amend on the basis of S.C. Code Ann. § 29-3-650?**

STATEMENT OF THE CASE

This appeal concerns the foreclosures of two mortgages given to SCBT by Sand Dollar 31, LLC, securing two loans that were also personally guaranteed by Meisner.

On July 24, 2006, Sand Dollar 31, LLC, delivered a promissory note to SCBT in the amount of \$36,000.00 to finance the purchase of a rental property. (R. p. 5.) On July 24, 2006, Sand Dollar, 31, LLC, delivered a second promissory note to SCBT in the amount of \$31,140.00 to finance the purchase of a second rental property. (R. p. 15.) Each note was secured by a mortgage on the respective properties. (R. pp. 5, 15.) As additional security for the notes, Meisner executed personal guaranty agreements for both loans. *Id.*

On September 22, 2011, SCBT filed these foreclosure actions against Sand Dollar 31, LLC, asserting that the notes were in default and requesting the mortgages be

¹ SCBT, N.A. is now known as South State Bank.

foreclosed. On September 27, 2011, SCBT amended its complaint to also seek a judgment against Meisner personally on her guaranty of the loans. (R. pp. 21-49.)

Sand Dollar 31, LLC, and Meisner filed an Answer and Counterclaim in which they asserted a counterclaim for a declaratory judgment as to the responsibilities and obligations of the parties under the notes, mortgages, and guarantee agreements. (R. pp. 50-59.) A close reading of the counterclaim reveals that its only purpose was to assert and preserve the defendants' appraisal rights. *Id.* The Answer and Counterclaim did not assert any defense that Meisner signed the guaranty agreements only in her capacity as a member of the LLC and not in her personal capacity (hereinafter referred to as the "capacity" defense). *Id.* SCBT timely filed a Reply to the counterclaim.

On April 25, 2012, the Honorable Joseph M. Strickland, Master in Equity for Richland County ("Master"), held a foreclosure hearing. A representative of SCBT appeared and testified. (R. p. 62, line 18-p.72, line 5.) The Master also heard testimony from Ms. Meisner. (R. p. 73, line 17-p. 81, line 18.) The Master granted SCBT's causes of action for foreclosure and enforcement of the guaranties. (R. p. 4.)

On May 16, 2012, the Master entered Judgments of Foreclosure and Sale in both cases. (R. pp. 5, 14.) The Master attached Form 4 orders to each of the judgments that instructed the Clerk of Court to enroll the total judgment debt amounts in both cases against Sand Dollar 31, LLC, and Meisner. (R. pp. 12-13.)

On June 4, 2012, the subject properties were sold at a foreclosure sale. Because SCBT demanded a deficiency judgment, the property was scheduled for a second sale on July 5, 2012.

On June 7, 2012, in both cases, Sand Dollar, LLC and Meisner filed a Motion to Alter or Amend pursuant to Rules 52, 59, and 60, SCRCF. (R. p. 126). In the motion, Meisner argued that (1) the Form 4 judgments against her individually were premature until after the foreclosure sale and after the exercise of her appraisal rights, (2) the terms of the guaranty agreements limited her personal liability for the deficiency to a specific dollar amount, and (3) the amount that the Master awarded SCBT in attorney's fees was not supported by sufficient evidence. (R. p. 128-130). This was the first time that Meisner raised the issue of the limitation on her personal liability under the guarantee agreements. The motion made no mention of the "capacity" defense.

On July 18, 2012, the Master held a hearing on the Motion to Alter or Amend. (R. p. 85). After hearing the arguments of the parties, the judge denied the motion. (R. p. 106, lines 2-3; p. 109, lines 11-15.)

On September 6, 2012, SCBT filed a motion to vacate the foreclosure sale, but this motion was never heard or ruled on by the Master before SCBT voluntarily withdrew the motion. (Pet. Reh'g p. 8.)

On November 6, 2012, the Master held a status conference at which no court reporter was present. That same day, the Master entered an Order Denying Defendants' Motion to Alter or Amend in both cases. (R. p. 1).

On December 6, 2012, Meisner, proceeding *pro se*, filed this appeal from the Order Denying Defendants' Motion to Alter or Amend. After having failed to raise it in the lower court, Meisner raised the capacity defense for the first time in her Brief of Appellant.

On December 3, 2014, the Court of Appeals entered an Order affirming the Master on all issues raised in Meisner's appeal except for his award of attorney's fees to SCBT in both foreclosures. The Court of Appeals remanded the cases "so the master can award reasonable attorney's fees." (Opinion p. 2.)

On December 18, 2014, Meisner filed a Petition for Rehearing. (Pet. Reh'g.) In her Petition for Rehearing, Meisner raised the following issues for the first time: (1) whether the lack of a court reporter at the November 6, 2012, status conference deprived her of due process, (Pet. Reh'g p. 8), and (2) whether the Master's entry of the Form 4 judgments against her violated S.C. Code Ann. § 33-44-303(a), (Pet. Reh'g p. 6).

By Order of January 23, 2015, the Court of Appeals denied Meisner's Petition for Rehearing.

ARGUMENTS

I. No special and important reasons exist for the Court to issue a Writ of Certiorari.

Meisner's Petition does not meet the "special and important" standard required by Rule 242(b), SCACR. Reasons that may justify this Court's review of a decision of the Court of Appeals include the following: (1) where there is a dissent in the decision of the Court of Appeals; (2) where substantial constitutional issues are directly involved; (3) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court; (4) where there are novel questions of law; and (5) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. Rule 242(b), SCACR.

None of the judges on the Court of Appeals issued a dissenting opinion. Meisner's Petition does not involve any substantial constitutional issues or federal questions, and does not conflict with any decision of the United States Supreme Court.

Meisner's Petition presents no novel questions of law. As discussed later in this Return, most of the issues raised in the Petition for a Writ of Certiorari are not properly submitted to or preserved for review by this Court. The only question properly presented to the Court is whether the Court of Appeals erred in affirming the Master based on S.C. Code Ann. § 29-3-650. This question is not novel and is answered by a plain reading of the language of that statute.

Finally, the decision of the Court of Appeals does not conflict with any prior decision of this Court. Meisner's Petition cites to only two cases, neither of which conflicts with or is even relevant to the Court of Appeals' decision in this matter. *See Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC*, 406 S.C. 596, 753 S.E.2d 840 (2012) ("Finally, by personally guaranteeing the development loan, Appellant became personally liable for the repayment of that particular financial obligation."); *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (construing Protection from Domestic Abuse Act in determining whether family court violated husband's right to due process in issuance of a temporary Order of Protection in criminal domestic violence case).

Therefore, Meisner's Petition fails to present any of the traditional special and important reasons that justify this Court's review of a decision of the Court of Appeals.

II. Meisner’s Petition for a Writ of Certiorari improperly includes several questions that were not raised both in the Court of Appeals and in her Petition for Rehearing.

“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Rule 242(d)(2), SCACR (emphasis added). Specifically, Meisner improperly includes the following issues in her Petition for a Writ of Certiorari:

- Whether the Master’s entry of the Form 4 judgments against her on May 16, 2012, pursuant to S.C. Code Ann. § 29-3-650 violated her right to due process because SCBT named her in the lawsuits pursuant to a different statute—§ 29-3-660. (Pet. Writ Cert. p. 13.) Meisner did not raise this issue in her Brief of Appellant, Reply Brief, or Petition for Rehearing in the Court of Appeals.
- Whether the lack of a court reporter at the November 6, 2012, status conference before the Master violated her right to due process. (Pet. Writ Cert. p. 14.) Meisner did not raise this issue in either her Brief of Appellant or Reply Brief in the Court of Appeals. She raised it for the first time in her Petition for Rehearing.
- Whether the Master’s entry of the Form 4 judgments against her violated S.C. Code Ann. § 33-44-303(a). (Pet. Writ Cert. pp. 8, 12.) Meisner did not raise this issue in either her Brief of Appellant or Reply Brief in the Court of Appeals. She raised it for the first time in her Petition for Rehearing.
- Whether the Master’s award of attorney’s fee should have been taxed against only Sand Dollar 31, LLC, and not against Meisner individually. (Pet. Writ Cert. p. 15.) Meisner did not raise this issue in her Brief of Appellant, Reply Brief, or Petition for Rehearing in the Court of Appeals. In her Motion to Alter or Amend and her appellate briefs in the Court of Appeals, Meisner challenged only the amount of attorney’s fees awarded, and never challenged the allocation of that award between her and her co-defendant.

Therefore, none of these issues are properly before the Court.

III. Meisner’s “capacity” defense is not preserved for review because she raised it for the first time in the Court of Appeals.

The Court of Appeals correctly ignored Meisner’s “capacity” argument in her appellate briefs because she never raised it at any point in the lower court.

“It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.” *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). “If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *see also* Rule 59(e), SCRCP. This preservation requirement “prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” *Id.*

Meisner failed to raise this defense in her pleadings (R. pp. 50-59) or at the foreclosure hearing (R. pp. 60-84). Meisner’s argument that a Rule 60 motion somehow “re-opens the case” for issue preservation purposes is irrelevant because she did not raise the capacity issue in her Motion to Alter or Amend either. (R. pp. 128-30.) Rather, Meisner raised this defense for the first time to the Court of Appeals in her Brief of Appellant. (Appellant Br. p. 11.)

Having failed to preserve the issue, Meisner resorts to improper burden shifting by arguing that SCBT failed to *disprove* this defense at the foreclosure hearing. (Petition Writ Cert. pp. 4, 11-12.) (“[T]he Bank did not determine the legal status of Ms. Meisner under the guaranty agreement...Ms. Meisner did not testify to the capacity that she signed the guaranty agreements.”) Even if Meisner had raised the capacity defense in the lower court (which she did not), she would have the burden to prove the defense before the burden shifted back to SCBT to disprove it. *Youmans ex rel. Elmore v. S. Carolina*

Dep't of Transp., 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008)(“The defendant asserting an affirmative defense bears the burden of its proof.”); *Moon v. Ctr.*, 133 S.C. 51, 130 S.E. 549, 549 (1925)(“The respondent having possession of the evidences of the debt, the burden of proof was upon the appellant to make good his defenses by the greater weight of the evidence.”).

Once SCBT proved the debt amount (R. p. 67, lines 6-25) and Meisner’s personal guaranty of the debt (R. p. 69, lines 14-17) at the foreclosure hearing, the burden to prove any defenses shifted to Meisner. She failed to even raise the “capacity” defense in the lower court, much less meet her burden of proof. (R. pp. 60-84.)

For these reasons, Meisner’s “capacity” defense is not preserved for review.

IV. The Court of Appeals did not err in affirming the Master’s Order Denying Defendants’ Motion to Alter or Amend on the basis of S.C. Code Ann. § 29-3-650.

Meisner’s argument that the Master improperly entered the Form 4 judgments against her pursuant to § 29-3-650 because the statute is inapplicable to “guarantors who are not also mortgagors” (Pet. Writ Cert. p. 8) ignores the plain language of the statute.

The statute reads in its entirety:

The court may also render judgment against the parties liable for the payment of the debt secured by the mortgage and direct at the same time the sale of the mortgaged premises. Such judgment so rendered may be entered and docketed in the clerk’s office in the same manner as other judgments. Upon the sale of the mortgaged premises the officer making the sale under the order of the court shall credit upon the judgment so rendered for the debt the amount paid to the plaintiff from the proceeds of the sale.

S.C. Code Ann. § 29-3-650 (emphasis added). The statute permits the simultaneous entry of an order of foreclosure sale and a personal judgment against any “part[y] liable for the

payment of the debt secured by the mortgage.” *Id.*; see also *Fed. Land Bank of Columbia v. Davant*, 292 S.C. 172, 178, 355 S.E.2d 293, 296 (Ct. App. 1987).

Meisner’s personal liability for the debt secured by the mortgage was never at issue in the lower court. Meisner repeatedly acknowledged her personal liability for the subject debt, only ever challenging the *extent* of that liability. (R. pp. 128, 133)(“[T]he maximum amount of Rhonda Meisner’s personal liability is limited to [] as this was the amount of her personal guarantee...”); (R. pp. 143, 194)(“The Defendant sought this declaratory judgment because Rhonda Meisner wanted to make certain that, should there be a deficiency judgment, her liability for the deficiency did not exceed the amount she personally agreed to pay in the Guarantee Agreement.”); (R. p. 242)(“The Guaranty Agreements placed monetary limitations on Meisner’s personal liability. Meisner sought this declaratory judgment because she wanted to make certain that, should there be a deficiency judgment, her liability did not exceed those limitations.”).

Because Meisner was a “part[y] liable for the payment of the debt secured by the mortgage,” the Master was within his discretion to enter a personal judgment against her at the same time that he entered a judgment of foreclosure and sale.

Meisner’s contention that S.C. Code Ann. § 29-3-660, and not § 29-3-650, should have controlled the Court of Appeals’ review is meritless. That statute reads:

In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

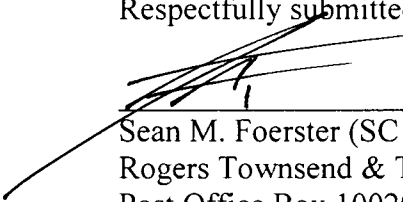
S.C. Code Ann. § 29-3-660. This statute only pertains to a later entry of a deficiency judgment after the foreclosure sale. It does not negate the Master's discretionary authority under § 29-3-650 to enter a personal judgment for the full, pre-sale debt amount at the same time that he enters a judgment of foreclosure and sale. *White v. Douglas*, 128 S.C. 409, 123 S.E. 259, 259 (1924) (“This statute [the prior version of § 29-3-650] did not purport to give a discretion to the circuit judge as to the amount of the judgment, but simply as to whether the personal judgment should be given at the time of the judgment of foreclosure or to await the coming in of the master's report of sale.”). The statutes do not conflict with each other as both entitle the debtor to a credit against the personal judgment for the amounts later received from the foreclosure sale. S.C. Code Ann. § 29-3-650 (“Upon the sale of the mortgaged premises the officer making the sale under the order of the court shall credit upon the judgment so rendered for the debt the amount paid to the plaintiff from the proceeds of the sale.”).

For these reasons, the Court of Appeals did not err in affirming the Master's Order Denying Defendants' Motion to Alter or Amend based on S.C. Code Ann. § 29-3-650.

CONCLUSION

No special and important reasons exist for this Court to issue a Writ of Certiorari in this matter. Based on the foregoing, the Court must deny Meisner's Petition for a Writ of Certiorari.

Respectfully submitted,



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Sand Dollar 31, LLC; Rhonda
Meisner.....Defendants,

Of Whom Rhonda Meisner is
the.....Petitioner.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the Return to Petition for a Writ of Certiorari on April 14, 2015, by depositing a copy of each in the United States Mail, postage prepaid, addressed to the each of following attorneys of record:

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April 14, 2015

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk of Court
1231 Gervais Street
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RECEIVED

APR 14 2015

S.C. Supreme Court

Re: *SCBT, N.A. vs. Sand Dollar 31, LLC; Rhonda Meisner*
Appellate Case# 2015-00352
Our File# 16555-79

Dear Mr. Shearouse:

Enclosed is an original and seven copies of Respondent's Return to Petition for a Writ of Certiorari in reference to the above matter.

By copy of this correspondence, I am serving a copy of this return on the Appellant.

Please file the original and return a clocked copy of this document to me in the enclosed, self-addressed, postage pre-paid envelope provided for your convenience.

Very truly yours,



Sean M. Foerster

/tds
Enclosure

cc:
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