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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2013-CP-26-2861
Appellate Case No. 2014-002047

Phyllis Hufton,..... .... Respondent,

v.

Flagstar Bank, FSB and John Doe..... .Defendants,

Of whom Flagstar Bank, FSB, is the Appellant.

FINAL BRIEF OF RESPONDENT

TRAYWICK & TRAYWICK, LLC

David P. Traywick
SC Bar No. 78502
E-mail: dpt@traywicklaw.com
Benjamin A. Traywick
SC Bar No. 74027
E-mail:ben@traywicklaw.com
875 Lowcountry Boulevard, Suite 204
Mount Pleasant, SC 29464
(843) 343-5092

Attorney for Respondent Phyllis Hufton

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STATEMENT OF THE CASE

Respondent Phyllis Hufton ("Hufton") commenced this case on April 29, 2013 by filing a *Lis Pendens* and Summons and Complaint seeking a declaratory judgement that she is the fee simple owner of certain real property located at 1321 South Ocean Boulevard, Unit 506, North Myrtle Beach (the "Property"). (R. p. 22). Hufton further alleged that the earlier foreclosure of a mortgage owned by Appellant Flagstar Bank, FSB ("Flagstar") had no effect on her individual interest in the property because she was allegedly not named individually in the foreclosure action. (R. p. 22). On June 24, 2013, Flagstar filed a motion to dismiss for lack of subject matter jurisdiction based on the master's reservation of jurisdiction, or to stay the matter and refer it to the master. (R. p. 43). This motion was denied by Form 4 order on August 15, 2013. (R. p. 15). Flagstar thereafter filed an answer and counterclaim asserting that Hufton's interest was foreclosed and that even if it was not, then Hufton's sole remedy is to redeem Flagstar's interest by paying the full amount of Flagstar's debt.

On April 7, 2014, Flagstar filed a motion for summary judgment with supporting exhibits. (R. p. 77). On April 14, 2014, Hufton filed a motion to amend the complaint to add a cause of action to partition the Property. (R. p. 151). On May 12, 2014, Hufton filed a motion for partial summary judgment asserting that, as a matter of law, her interest in the Property survived foreclosure. (R. p. 156).

On June 4, 2014, Judge Larry B. Hyman denied Flagstar's motion for summary judgment by Form 4 order, and granted Hufton's motion to amend to add a claim for partition. (R. p. 17). On June 13, 2014, Hufton filed an amended complaint adding the partition claim. (R. p. 218). Flagstar filed an answer and counterclaims to the amended complaint on June 18, 2014. (R. p. 222).

Judge Steven H. John granted Hufton's motion for partial summary judgment by order dated July 14, 2014. (R. p. 19). On August 4, 2014, Flagstar timely filed a motion to alter or amend Judge John's order granting partial summary judgment. (R. p. 306). Flagstar's motion to alter or amend was denied by Form 4 order on September 19, 2014. (R. p. 21). Flagstar timely served its Notice of Appeal on September 23, 2014. This appeal follows.

FACTS

These are the facts pertinent to this appeal: On April 7, 2008, James W. Hufton and Elmer J. Craft purchased the subject property. (R. pp. 92-93). On June 5, 2009, Elmer Craft died; on August 22, 2010, James Hufton died. On September 9, 2011, Phyllis Hufton purchased a deed for Elmer Craft's one half interest in the subject property from his estate; she recorded the deed on September 16, 2011. (R. pp. 163-164). On January 18, 2012, Traywick Law Offices discussed the title status of the subject property with Scott Law Firm. On February 1, 2012, Traywick Law Offices sent a letter to Scott Law Firm which attached the deed from Craft's estate and established

Phyllis Hufton's sole title to the subject property. (R. pp. 165-184). The February 1, 2012 letter establishes that Flagstar Bank, FSB ("Flagstar") had actual knowledge of the conveyance from the Estate of Craft to Hufton, individually, of the Craft Estate's one half interest in the property.

On February 20, 2012, Flagstar filed a Lis Pendens Summons and Complaint wherein Phyllis C. Hufton was named only in her capacities as Personal Representative and Legal Heir of the Estate of James W. Hufton, Sr., Deceased. (R. pp. 22-31) She was not named individually. (R. p. 328, lines 11-14) On March 7, 2012, Phyllis C. Hufton, as Personal Representative and Legal Heir of the Estate of James W. Hufton, Sr., Deceased, served an Answer admitting each and every allegation appearing in the Complaint for Foreclosure. (R. pp. 130-131) On August 27, 2012, Judge Stroman, Special Referee for Horry County, entered an Order and Judgment of Foreclosure and Sale. (R. pp. 134-147).

On April 10, 2013, Hufton received correspondence from Brad Jones of Brady & Kosofsky, a North Carolina law firm. The letter stated:

> This office represents Flagstar Bank in its sale of the above referenced property. As I gathered from the foreclosure file for the property, you represented Phyllis C. Hufton and filed an answer to the foreclosure complaint on her behalf. It has come to our attention that due to inadvertence or mistake, there was an error in the foreclosure as to how Ms. Hufton was named in the action. I reached out to the foreclosure attorneys about correcting this issue and have not yet heard back from them. I would like to ask for your assistance to see if Ms. Hufton would be willing to sign a quitclaim deed to resolve the defect.

(R. p. 323, line 21 – p. 324, line 7). This was the first Hufton had ever learned about any defect in the foreclosure lawsuit. Jones offered Hufton money in exchange for a quit claim deed, but Hufton declined, instead opting to seek the full rights remaining to her in the title and filed a lawsuit naming Flagstar Bank as a defendant for a declaratory judgment. (R. p. 323, line 21 – p. 324, line 7).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT HUFTON'S DEED WAS UNAFFECTED BY THE FORECLOSURE ORDER AND SALE.

Appellant's first ground on appeal asserts that the trial court erred in finding that Respondent's property interest survived the attempted foreclosure because Hufton was named and served in an individual and representative capacity. Appellant sets forth subsidiary grounds as well:

A. Hufton was named and served in the foreclosure action;

B. Hufton was a party to the foreclosure action and the court had personal jurisdiction over her;

C. The court failed to consider applicable rules of procedure in pleadings;

D. The court permitted Hufton to play 'capacity' games;

E. The trial court did not consider Hufton's general admission Answer and that Hufton failed to raise the issue of capacity.

Appellant's grounds depend, more or less, on the following misrepresentations of fact: (1) that Hufton was named individually; (2) that Hufton was served individually; (3) that the trial court obtained personal jurisdiction over Hufton and her parcel; and (4) that Hufton individually answered the foreclosure complaint.

EXCERPT: SUMMARY JUDGMENT HEARING

Judge All right. In the Complaint of Flagstar Bank *it's without question she was not named individually in the caption*, correct?

Flagstar: *Yes, Your Honor.*

Judge: *There's no question about that.* All right. In the body of the Complaint, the facts alleged in the body of the Complaint says that the Defendants against whom they claim, or may claim, in order to clear title to this property are as follows, and it's got a laundry list. Number one, Party Named: The Defendant, Phyllis C. Hufton, as Personal Representative and legal heir of

the Estate of James W. Hufton, Sr. in such fiduciary capacity as representative of any person or entity that may be a creditor or a claimant against such Estate, and by virtue of the powers granted by Decedent's Will or by statute, and by virtue of any interest claimed under the Law of Succession, or under Decedent's Will. *It makes no mention in the Complaint anywhere of her deeded individual interest in the property, correct*?

Flagstar: *Yes, Your Honor.*

Judge: *Doesn't say it in the Complaint in any way, correct*?

Flagstar: *Correct.*

(R. p. 328, line 11 – p. 329, line 7) (emphasis added). During the examination Appellant was forced to abandon its contention that Hufton was named in her individual capacity as a party to the foreclosure suit. Appellant further admitted the following facts in open court: (1) Respondent individually does not appear on the foreclosure complaint case caption; (2) The body of the foreclosure complaint makes no mention anywhere of Respondent's deeded individual interest; (3) Flagstar served Hufton twice, once as personal representative, then as heir; but never individually.

A. Hufton Was Neither Named nor Served Individually in the Foreclosure.

Appellant necessarily begins its appeal by stating: "Hufton was named and served in the foreclosure action." However this statement fails to be a truth.

1. Hufton Was Not Named In An Individual Capacity.

"In the summons and complaint *the title of the action shall include the names of all parties.*" Rule 10(a), SCRCP (emphasis added). Best practice in disputes involving real property requires parties to seek out parties in interest because they are readily identifiable in county land records. "A person [claiming an interest in the action] who is subject to service of process . . . *shall be joined* as a party in the action." Rule 19(a), SCRCP (emphasis added).

The purpose of a foreclosure suit is to determine, out of all of the parties claiming to have title to a property, which of the parties actually holds the title. Thus, all parties having titles of

record are necessary parties in a foreclosure suit. Respondent's title is recorded in Horry County, making her an obvious necessary party. (R. pp. 171-172). Accordingly, Appellant's failure to name Respondent individually in the foreclosure presupposed that a defective foreclosure would be the result.

Appellant's failure to name Respondent in her individual capacity was not a mere oversight. Appellant possessed actual knowledge of the nature, degree, and source of Respondent's interest in the property. (R. pp. 165-184). Hufton's prior correspondence with Flagstar included a copy of the quit claim deed. Aside from possessing the deed, Flagstar performed a title search. Despite that wealth of information, Appellant failed to describe Hufton's ownership interest among the factual allegations appearing in the complaint. (R. p. 329, lines 2-7).

2. Hufton Was Not Served In An Individual Capacity.

Appellant failed to serve Respondent in accordance with Rule 4(a), SCRCP which states: "Copies of the original summons *shall be served upon each defendant.*" Rule 4(a), SCRCP (emphasis added). The law in South Carolina is clear that when service fails the court does not attain personal jurisdiction over the non-served party. See e.g. Roche v. Young Bros., Inc. of Florence, 456 S.E.2d 897, 899, 318 S.C. 207, 209 (1995) (stating that Rule 4, SCRCP has two purposes: it confers personal jurisdiction on the court and assures the defendant of notice). Phyllis Hufton was not served in her individual capacity. (R. p 329, line 8 – p 331, line 1). Without proper service the civil action was not commenced as to Hufton and the court failed to attach personal jurisdiction over Hufton and her property, see e.g. Matter of Palmer, 380 S.E.2d 813, 815, 298 S.C. 324, 327 (1989) (civil action commences upon filing and service of summons and complaint).

> Judge: All right. The Affidavits of Service, she gets served twice. She gets served as the personal representative, and she gets served as an heir. That's what the Affidavits of Service say, correct?

Flagstar And then her attorney asked that she not be served personally anymore, that he would accept service on behalf of all titled[1] owners.
Judge: *But where is the Affidavit of Service in the file?*
Flagstar *That's – no sir.*
Judge: *Doesn't exist?*
Flagstar. *No.*
Judge: *That document doesn't exist in the file.*
Flagstar: An Affidavit of Service is not - - the email is attached to our Memo and - -
Judge: I understand it's in the Memo. *It's not in the foreclosure action in any way. There is nothing by the attorney indicating that such occurred, correct?*
Flagstar: *Yes, Your Honor.*

(R. p. 329, line 8 – p. 330, line 1). Appellant's statements make it apparent, no affidavit of service exists nor any other document in the court's foreclosure action file that establishes service on Respondent in her personal capacity. (R. p. 329, line 8 – p. 330, line 1). Furthermore, Appellant admits that no service of process was ever effected on Respondent. (R. p. 329, line 8 – p. 330, line 1).

JUDICIAL ESTOPPEL AS A BAR TO APPELLANT'S GROUNDS ON APPEAL

Appellant's grounds on appeal are barred because their inherent bases are versions of facts, the contrary to which Appellant has already stipulated: "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." Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 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

[1] Flagstar's statement here is a gross mischaracterization of correspondence before the Court. Attorney for Hufton stated "I represent Phyllis Hufton, and the rest of the known parties named as defendants. I had already agreed to accept service on behalf of my client(s)." [R. 124-25] Respondent's courtesy was utterly ignored. Flagstar served each and every named Defendant in the foreclosure lawsuit – causing unnecessary grief to the heirs on top of the loss of their father and husband. Hufton's attorney had hoped to avoid such further grief by extending a courtesy. Though never taken up by Flagstar at the time, they now look to use the mere extension of a courtesy as a weapon.

> 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.

Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 251-252, 489 S.E.2d 472, 477 (1997) (emphasis added). Where Appellant has admitted facts contrary to those upon which it now builds its appellate grounds, those appellate grounds must be barred. Judicial estoppel's purpose is to punish those who knowingly misrepresent facts in order to gain advantage. See Cothran v. Brown, 350 S C. 352, 357-58, 566 S.E.2d 548, 548 (Ct. App. 2002).

Appellant hammers the same points repeatedly - Hufton was named, served, and answered in her individual capacity in the foreclosure lawsuit. Appellant cannot be permitted continually to deny facts already established:

B. Hufton Was Not Party to the Foreclosure Action

1. The Court lacked personal jurisdiction over her.

Because in the foreclosure proceeding Hufton was a party only in two limited capacities (as personal representative and as heir), the Court lacks personal jurisdiction over Hufton, individually, in the matter at hand. (R. p. 328, lines 11-14). In South Carolina, courts routinely distinguish parties who appear in an individual capacity from those who appear in a special or limited capacity: as an administrator, or as an heir to an estate. Instances of this duality abound in the case law:

> "Chase, as current holder of the note and mortgage, filed this action against Cassandra individually and in her capacities as personal representative and legal heir of Sidney's estate." Chase Home Finance, LLC v. Cassandra S. Risher, individually, as Personal Representative and Legal Heir of the Estate of Sidney Allan Risher, 405 S.C. 202, 207, 746 S.E.2d 471, 474 (Ct. App. 2013).

> "Of the appellants, only Anderson and Burnett are heirs of Joseph Woodruff and C. P. Woodruff, and they elected below to appear solely as individuals, and not as heirs, or representatives of the heirs, of either of the Woodruffs."

First Baptist Church of Woodruff v. Turner, 248 S.C. 71, 74, 149 S.E.2d 45, 46 (1966).

> "Although there was a misjoinder of causes of action, in that a cause of action was attempted to be set forth against Sallie W. Burgess individually . . . and another cause of action against her and the other defendants as heirs at law . . . no point would be made of the misjoinder, and that, so far as the case against Sallie W. Burgess individually under policy No. 80922 was concerned, she would answer and meet that cause of action individually..." Philadelphia Life Ins. Co. v Burgess, 18 F.2d 599, 600-01 (D.S.C. 1927).

The distinction made by South Carolina Courts between a party named in their individual versus representative capacity is clear. The failure to name Hufton individually means that neither she as an individual, nor her individually held property interest were before the Court in the foreclosure proceeding. Respondent was named and served as a Personal Representative and as an Heir, but Appellant never named nor served Respondent in her individual capacity. Therefore, it necessarily follows that the court never had personal jurisdiction over Hufton in her individual capacity in the 2012 foreclosure litigation.

2. The court lacked jurisdiction over her property.

Though it is a proposition encompassed, technically, by the lack of personal jurisdiction, Hufton notes that by virtue of its lack of jurisdiction over her, individually, this Court likewise lacks jurisdiction over any property interest she holds individually, including the interest for which she has filed to quiet title in the Circuit Court. This interest was in no way described or identified in the foreclosure Complaint; as such, the foreclosure action did not affect, and the Master's Deed did not convey, her individually held interest.

Flagstar did not avail itself of this opportunity: if it had done as the Court sagely advised, Flagstar would have discovered the deed reflecting Hufton's individual interest,[2] which already

[2] Frankly, given that Hufton's deeded individual interest was duly recorded prior to the *lis pendens*, one wonders if a title search was done at any point, as implied by Flagstar in its filings in the foreclosure action.

was on record. As a result of its failure to heed the call to diligence, Flagstar named and inconvenienced numerous parties it needed not (S.C. Code Sections 29-3-610. "It shall not be necessary to make the personal representative of a deceased mortgagor a party to any foreclosure proceeding..." and 29-3-620 "It shall not be necessary to make a mortgagor who has conveyed to another the mortgaged premises a party to any action for foreclosure when no judgment for a deficiency is demanded"), while failing to name Hufton, whose interest it now claims to have extinguished. Flagstar's position, in sum, is at odds with substantially every extant fundament of South Carolina real property law.

C. The trial Court understands Rules of Procedure and constructed pleadings in the case properly.

Appellant's arguments misconstrue the South Carolina Rules of Civil Procedure.

1. Rule 10(a) SCRCP

Rule 10(a) states:

> Every pleading shall contain a caption setting forth the name of the State and County, the name of the Court, the title of the action, the file number and a designation as in Rule 7(a). In the summons and complaint the title of the action shall include the names of all parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Rule 10(a), SCRCP. Appellant is correct that the rule does not address capacity specifically; it does however state that all parties should be named. It is only the "other pleadings" that all parties are not required to be named and only after the initial naming of the parties has been established. As has already been established above, "Phyllis C. Hufton" is much different than "Phyllis C Hufton, personal representative" or "Phyllis C. Hufton, heir to the estate". See generally, Chase v. Risher, *supra*. Therefore Appellant is and was required to name all necessary and known parties in the complaint.

2. Rule 9(a) SCRCP

Appellant also addresses Rule 9(a), which specifically addresses capacity:

> It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are within the pleaders' knowledge.

Rule 9(a), SCRCP.

Appellant gets the rule right but the application is incorrect. Averment of representative capacity is not required. However, Appellant did name Phyllis C. Hufton in two representative capacities, as a personal representative and as an heir, then failed to name Phyllis C. Hufton individually. There was no deficiency of capacity as to the Phyllis C. Hufton, Personal Representative and Phyllis C. Hufton, Heir seeing as she held both of those positions. Therefore there was no issue of capacity to be raised. Phyllis C. Hufton, individual, cannot answer when Phyllis C. Hufton, individual, has not been named.

3. Rule 8 SCRCP

Rule 8(e)(1), SCRCP states: "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Requiring all parties to be named, and it to be clear whether someone is named as an individual or in a representative capacity is not technical in form, but rather explanatory and good practice. Appellant cites Rule 8(f) and construes the pleadings to do substantial justice to the parties. However, to construe a complaint to include an individual not named would hardly serve justice. Allowing the Appellant to avail itself of its

negligent and flagrant errors, while blaming Respondent for her failure to show up and remedy Appellant's mistakes is not the equitable choice.

i. Hufton has not played "name games" or "capacity games". On the contrary, she extended every courtesy to Appellant's attorneys in the foreclosure case.

The Appellant cites Tri-County Ice and Fuel Co. v. Palmetto Ice Co. in an attempt to establish that Respondent is merely complaining about getting her name wrong. However, this is not a case of mistaken name or wrong name but excluding a name and person completely. As stated multiple times before and in more detail Phyllis C. Hufton is not the same as Phyllis C. Hufton, Personal Representative or Phyllis C. Hufton, Heir.

ii. Hufton Did Not File an Answer In An Individual Capacity.

Appellant hopes that if it repeats Respondent filed an Answer in her individual capacity enough times, that an inattentive audience might believe it to be true. A sampling of Appellant's hopes: "Hufton then filed an answer captioned 'Answer of Phyllis C. Hufton' (without limitation of qualification)..." Appellant's assertion here is dishonest because Hufton's 'COMES NOW' clause limited and qualified her answer in precisely the manner Appellant wishes it had not. A further sampling of Appellant's erroneous assertions:

> "Hufton then made a general appearance by her counsel who *filed and served an answer* captioned, 'Answer of Defendant Phyllis C. Hufton'" (App's Br p. 10);
>
> "Consider that Hufton admitted all allegations of the Complaint ..." (App's Br p. 11)
>
> "Hufton has not been prejudiced. She was served with the foreclosure complaint, represented by counsel, filed an answer..." (App's Br p. 12);
>
> "Hufton filed and served an answer captioned, 'Answer of Defendant Phyllis C. Hufton' ." (App's Br p. 13);
>
> "...in this case, Hufton was a party and did not appeal..." (App's Br p. 14)

All of Appellant's characterizations of Respondent's Answer to the foreclosure complaint are barred by judicial estoppel, or are blatant mischaracterizations because they seek to establish that Hufton answered individually by ignoring the fact that Respondent pled as follows: "**COMES NOW, Defendant Phyllis C. Hufton, as Personal Representative and Legal Heir of the Estate of James W. Hufton, Sr., Deceased** (hereinafter referred to as the "Defendant") by and through her undersigned attorney, . . ." (R. p. 130). The language clearly limits the capacity in which Respondent answered. Hufton Answered the Complaint in the capacities in which she was served, which did not include her individual capacity. Hufton was neither named and served, nor answered in her individual capacity. Regardless, if Appellant calls Respondent's answer a "General Admission" answer it cannot be considered an answer of Phyllis C. Hufton, individually because Phyllis C. Hufton, as an individual, was never a part of the foreclosure action below. She cannot have been a part of the action below because the court never had jurisdiction over her for Appellant's failure to name and serve her. Therefore, it was impossible that Respondent's answer would be representative of Phyllis C. Hufton as an individual. Respondent had no issue over the capacity in which she was sued as an Heir and Personal Representative because she held both of those positions. She was properly sued in both of those representative capacities. It is the fault of the Appellant alone that they failed to name Respondent in her individual capacity, and certainly not Respondent's job to point that out—especially to her disadvantage.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT JUDGE STROMAN LACKED JURISDICTION OVER HUFTON AND THAT THE FORECLOSURE JUDGMENT WAS A NULLITY *VIS A VIS* RESPONDENT, IN HER INDIVIDUAL CAPACITY.

Appellant's second ground for appeal asserts the trial court erred in not holding Judge Stroman's Order the Law of the Case in Hufton's subsequent declaratory judgment action This

second ground on appeal, like the first ground, depends upon an appellate reversal of the trial court's finding of fact: that Hufton, individually, was neither named, nor served, and therefore was not a party to the foreclosure suit.

A. Respondent, Individually, Did Not Answer or Make a General Appearance in the Foreclosure Lawsuit. There was no Waiver, Therefore Judge Stroman Did Not Have Personal Jurisdiction.

Appellant proposes that Hufton's counsel accepted service on behalf of Hufton individually, and answered on her behalf, thereby waiving personal jurisdiction objections. (R. p. 330, lines 6-19).

Hufton's attorney, David Traywick, did offer to accept service as a courtesy to Flagstar and signed an acceptance of service. (R. p. 32). Flagstar ignored the extended courtesy and served all of the named Defendants, including Respondent in the two distinct representative capacities in which she was named - as personal representative and as heir. (R. p. 33). Appellant states that Hufton's attorney filed an answer on behalf of Hufton in her individual capacity. However, the Answer Appellant refers to clearly states that the pleading was that of "Defendant Phyllis Hufton, as Personal Representative and Legal Heir of the Estate of James W. Hufton, Sr., Deceased". (R. p. 285). Accordingly, Respondent did not Answer, did not enter a 'general appearance' in her individual capacity, and consequently did not waive personal jurisdiction as Appellant contends.

B. Judge Stroman's Court Order Does Not Apply to Respondent, in Her Individual Capacity, Since the Foreclosure Court Lacked Personal Jurisdiction.

"A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on." Webster v. Clanton, 259 S.C. 387, 391-2, 192 S.E.2d 214, 216 (S.C., 1972) (citing cases collected in West's South Carolina Digest, Judgment, k488, 489 and further citing 46 Am.Jur.2d 347, Judgments, Sec. 49, and 49 C.J.S. Judgments § 23, p. 52.); see also, Tryon Federal Sav. and

Loan Ass'n v. Phelps, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1991), "It is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are affected." citing Insurance Co. of North America v. Hyatt, 290 S.C. 159, 348 S.E.2d 532 (1986). See generally Koester v. Citizens' Pub. Co., 154 SC 154, 151 S.E. 452 (1930).[3]

Judge Stroman lacked jurisdiction over Hufton individually. Thus, his decree was a nullity as to Hufton and to her property interests, much less the law of the case in Hufton's declaratory judgment action.

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[3] *Koester* cites numerous authorities for the proposition that a decree is void where a party was either not named or not served in an action. e g "A judgment against a party not named in the complaint nor any part of the record is void. We cannot presume that one who does not appear to have been a party had his day in court." Freeman on Judgments (2d Ed.) § 141; *and* "If the judgment or decree is silent upon the subject of service of summons, and the service shown by the return upon the summons is not such as will give the court jurisdiction, no doubt the judgment is void." Freeman on Judgments, § 133; *and* "If the decrees are void and the parties not served; that is a fatal defect without proof." *Bradley v Calhoun*, 116 S. C 7, 106 S. E. 843, 844, *and* "A court without jurisdiction cannot render a valid judgment. Its judgment may be disregarded and objected to at any time " *Beaudrot v. Murphy*, 53 S. C 118, 30 S. E. 825, 826; *and* "But a judgment by a court without jurisdiction of the parties and subject-matter is a nullity, and must be so treated by other courts whenever and for whatever purpose it is presented and relied on " *State v Murray*, 79 S. C 316, 60 S. E. 928, 930, and "Jurisdiction to hear and determine the cause must exist before any decree or judgment therein can have any vitality whatever . .In every case there must not only be jurisdiction of the person and the subject-matter, but the person and the subject-matter must be brought before the court in a manner authorized by law, otherwise the judgment or decree is void, and not merely erroneous or voidable, and may be set at naught, either by a direct proceeding in the cause in which it was rendered or by a collateral attack. These propositions are elementary and fundamental, and are recognized as law everywhere." *Brenham v. Smith*, 120 Va 30, 90 S. E 657, 658, *and* "But a judgment obtained without process is not a judgment, it is a nullity, and may be declared void by every court in which it is called in question, whether collaterally or directly " *New Eagle Coal Co v Burgess*, 90 W. Va. 541, 111 S. E. 508, 509; *and* "It is a fully established position in this state and elsewhere that: 'A judgment rendered by a court against a citizen affecting his vested rights, in an action or proceeding to which he is not a party, is absolutely void, and may be treated as a nullity whenever it is brought to the attention of the court '" *Johnson v Whilden*, 171 N. C 153, 88 S E 223, 224, *and* "When the record itself discloses the fact that the court had no jurisdiction of the controversy, or the jurisdiction of the person of the defendant did not attach in the particular case, the judgment is a mere nullity, and may be collaterally impeached, by any person interested, whenever and wherever it is brought in question. Thus, when the defendant against whom a judgment was entered had no notice, and that appears from the proceedings, the judgment is void on its face. It is equally true of want of jurisdiction of the subject matter. Orders and judgments which the court has not the power under any circumstances to make or render are null and void, and their nullity can be asserted in any collateral proceeding where they are relied on in support of a claim of right." Black on Judgments, vol. 1, § 278; *and* "A judgment rendered by a court having no jurisdiction is a mere nullity, and will be so held and treated whenever and for whatever purpose it is sought to be used or relied on as a valid judgment " 33 C. J. 1072, § 34

Respondent was party to the foreclosure suit in two limited capacities: as personal representative and as heir. Therefore, the Master lacked personal jurisdiction over Respondent, individually, in the suit.

No attempt was made to serve Respondent, Phyllis C. Hufton, individually, in accordance with Rule 4, SCRCP. As a result of Flagstar's failure to serve Hufton individually, the Court lacked jurisdiction over the person of Phyllis C. Hufton. See Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995) (stating that Rule 4, SCRCP has two purposes: it confers personal jurisdiction on the court and assures the defendant of notice). Furthermore, to comply with the due process requirements of the United States Constitution, service of process or waiver is necessary.

Phyllis C. Hufton, in her individual capacity, neither appeared in the foreclosure suit nor waived her objections to personal jurisdiction. Due to failure to name her individually, Hufton did not receive notice of intent to eradicate her individually held interest Appellant's failure both to name and to serve Respondent, in her individual capacity, the Court had no power to eradicate her individually held interest regardless of intention.

III. APELLANT ISSUES III & V ARE NOT PRESERVED FOR APPELLATE REVIEW

Of Appellant's six issues on appeal, two are not preserved - Issue III and Issue V "Preserving issues for appellate review is a fundamental component of appellate practice." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532-33, 564 S.E.2d 322, 323 (2001). The error preservation rules definitively require two criteria to be met before an issue is preserved for appellate review: (1) raise the issue to the circuit court, and (2) obtain a ruling on the issue from the circuit court. See Wilder Corp. v Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); Holy Lock Distribs., Inc. v Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000).

Accordingly, the litigant must specifically raise the issue and also obtain a ruling on that issue from the circuit court. See, e.g. Wilder v. Wilke, 330 S.C. at 76, 497 S.E.2d at 733. Furthermore, a party may not raise an issue for the first time in a Rule 59 motion and expect that issue to be considered on appeal. See Hickman v Hickman, 301 S.C. 455, 392 S.E.2d 491 (Ct. App. 1990). Failure to follow the explicit rules renders the issue not preserved for appeal.

A. Appellant Issue III: Validity of the Quit Claim Deed

Appellant raised the issue of the validity of the quit claim deed for the first time in its Motion to Alter or Amend the Judgment granting Partial Summary Judgment in favor of Respondent (R. p. 314, line 9).

Appellant had ample opportunity to introduce questions concerning the quit claim deed at many points in the proceedings below but failed to do so. Instead, Appellant injected this question following Summary Judgment in favor or Respondent in a Rule 59(e) Motion to Alter or Amend. "[A] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Hickman v Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). Accordingly, the question of the validity of the quit claim deed cannot be considered on appeal and cannot serve as a basis for reversal as the issue has not been properly preserved for appeal.

B. Appellant Issue V: Failure to Grant Flagstar's Motion for Summary Judgment

Appellant asserts that the court erred in failing to grant Flagstar's motion for summary judgment. It has been recognized in this State that a denial of a motion for summary judgment is not immediately appealable. In Holloman v. McAllister, 345 S.E.2d 728, 729, 289 S.C. 183, 186 (S.C. 1986) the Supreme Court held that "the denial of a motion for summary judgment before trial is not reviewable after a trial of a case on its merits." In Ballenger v. Bown, 313 S.C. 476, 443

S.E 2d 379 (1994), the Supreme Court reiterated the State's approach stating that the Court routinely holds that a denial of a motion for summary judgment is not appealable even in the context of an appeal of a final judgment on the merits. Ballenger said a denial of summary judgment doesn't resolve the merits of anything: "[t]herefore, an order denying a motion for summary judgment is not appealable " Ballenger v. Bowen, 313 S.C. 476, 477-8, 443 S.E.2d 379, 380 (S.C. 1994).

Accordingly, Appellants request for review by this Court of the trial court's denial of Flagstar's motion for summary judgment is not reviewable at all, and cannot be the basis for a reversal.

IV. THE FORECLOSURE PROCEEDINGS ARE NOT *RES JUDICATA* RESPECTING RESPONDENT'S DECLARATORY JUDGMENT ACTION. NEVERTHELESS, RESPONDENT HAS MADE NO ATTEMPT TO DISTURB OR RELITIGATE THE CONTENTS OF THE FORECLOSURE ORDER.

Appellant's fourth ground for appeal asserts the trial court erred by not concluding that the foreclosure proceedings are *res judicata*. In Respondent's view, the trial court made no findings or ruled in a manner undermining *res judicata* of the foreclosure proceedings.

A. Res Judicata Does Not Bar The Declaratory Judgment Action

Res Judicata is an affirmative defense the purpose of which is to bar litigation where in a former suit the parties actually did or might have already decided the issue. To establish *res judicata* a party must establish three elements: 1) Identity of subject matter; 2) the existence of a prior adjudication; and 3) Identity of the parties.[4] In this case, the first two elements are without question satisfied. However, the Identity of the Parties element is not. Hufton, in her individual

[4] Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994) (*per curiam*) (citing Freezer v. R.J. Clarkson Co., 308 S.C. 188, 190, 417 S.E.2d 569, 571 (1992)).

capacity, was not a party to the former suit: she was neither named as party, nor served with, nor her interest anywhere described in the complaint. Accordingly, she's had no opportunity to litigate any issues or causes of action until her declaratory judgment action and *res judicata* does not apply.

To the extent Appellant argues *res judicata* to protect it's purchase at auction, Respondent agrees that the issue of the sale, the sale price, and the Master's Deed are all *res judicata*. However, Appellant states that "Flagstar purchased the property at the foreclosure sale [and] had no notice that Hufton . . . was not a party to the case and was not bound by the foreclosure judgment." With respect, this statement is patently absurd: Flagstar had in its possession a copy of the quit claim deed establishing Hufton's individual one half interest in the property. It is true Middleburg appears to have botched its task of performing title work for Flagstar. But even so, the caselaw in this State, together with its rules of procedure, to say nothing of the actual foreclosure order in the case, written by Flagstar's own hand, all warn that title holders omitted from a foreclosure action represent a grave danger – one that any party must exercise extreme care to avoid befalling them. (R. p. 146, line 20).

B. Flagstar's Title Work Was Defective

Flagstar did perform title work, as recommended by Judge Stroman's Order of Foreclosure and sale. However, the title work, performed by Middleburg Title, LLC, of Columbia, S.C., did not uncover the deed from Craft to Phyllis Hufton, despite the fact that Hufton had recorded her interest in September of 2011.

Appellant's true remedy is to sue Middleburg Title for failing to locate a recorded deed.

C. Foreclosure Order Warned That Sale Was Subject To Recorded Interests

The Order of foreclosure asserts its own adherence to the principle that a Court only has the power to sell property over which it has obtained jurisdiction. (R. p. 13, line 20). The Order indicates the limits of its authority to sell the property in two ways:

i. Conditions the sale on recognition of record claims to interest which were not before the Court ("This sale is subject to all title matters of record"); (R. p. 146, line 20).

ii. Notifies Flagstar of the wisdom of conducting its own title examination ("any interested party should consider performing an independent title examination"), all in light of the deed's limitations ("no warrant is given at all by the Court"). (R. p. 13, line 20).

D. Master's Deeds Only Convey Interests of Parties to Suit

Appellant quotes the Master's Deed wherein is stated a clear condition that the sale only included "estate, right, title . . . *of all parties to the said suit.*" (R. p. 150) (emphasis added). Appellant cites this language as proof that the Master's Deed conveyed the entire property.

The fact that a Master's Deed conveys only those rights, titles and interests that were before the Court is well established in South Carolina law. "The court makes the sale, and orders generally one of its officers to write the deed for the defendant, and to convey whatever title the defendant may have had, *and no more.*" Calder v. Maxwell, 99 S.C. 115, 117, 82 S.E. 997, 997, (1914) (emphasis added).

In this case, Hufton individually owned a one half deeded interest that she purchased for value and had recorded in Horry County a full five months prior to Flagstar's filing of the *lis pendens* and foreclosure complaint. (R. pp. 130-131). Hufton's deeded interest is nowhere described in the Complaint, and Hufton was neither named nor served in her individual capacity.

The Master's Deed was "made by an officer of the law, in his official capacity, under the mandate of the court, which required him to sell all the estate of the judgment debtor . . . whatever such estate might be, and *he had no authority to sell anything more or anything less*" Carolina Savings Bank v. McMahon et al., 37 S.C. 309, 309, 16 S.E. 31, 34 (1892) (emphasis added).

E. Inevitable Outcome

Middleburg Title performed sloppy title work and failed to uncover a duly recorded deed to Hufton in her individual capacity. This deed was recorded prior to the filing of the *lis pendens* by Flagstar in the suit. After the action was completed, Flagstar once again had an opportunity to protect its interests because the foreclosure Order itself gave notice that the pending sale was subject to recorded interests and recommended title work. Finally, the Master's Deed informed the purchaser that the conveyance represented only those rights that were held by parties in the foreclosure lawsuit. At every step in the process, Flagstar was on notice, both actual and constructive, from the Court Order, to the copy of the quit claim deed mailed to Flagstar by Hufton's attorney, that it had a problem. It did nothing to protect itself. Accordingly, its appellate grounds should be denied.

CONCLUSION

None of Appellant's bases for reversal are sufficient in this case. Appellant has an adequate remedy at law. It can sue for damages against the company that performed the title search, or against its own attorneys who prosecuted a 'defective' foreclosure.

Respondent prays this Court sustain the trial court and deny Appellant's appeal.

Respectfully submitted,

TRAYWICK & TRAYWICK, LLC

David P. Traywick
SC Bar No. 78502
E-mail: dpt@traywicklaw.com
Benjamin A. Traywick
SC Bar No. 74027
E-mail:ben@traywicklaw.com
875 Lowcountry Boulevard, Suite 204
Mount Pleasant, SC 29464
(843) 343-5092

Attorney for Respondent Phyllis Hufton

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APR 24 2015
SC Court of Appeals

APPEAL FROM THE HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2013-CP-26-2861
Appellate Case No 2014-002047

Phyllis Hufton, ... Respondent,

v.

Flagstar Bank, FSB and John Doe.. ..... Defendants,

Of whom Flagstar Bank, FSB, is the Appellant.

CERTIFICATE OF COMPLIANCE OF FINAL BRIEF

The undersigned certifies that the Appellant's Final Brief complies with rule 211(b), SCACR. Providing however with consent of opposing counsel and as directed by "case owner" at the Court of Appeals, the undersigned has deleted duplicate material and corrected citation deficiencies evident in the initial brief.

TRAYWICK & TRAYWICK, LLC

David P. Traywick
SC Bar No. 78502
E-mail: dpt@traywicklaw.com
Benjamin A. Traywick
SC Bar No. 74027
E-mail:ben@traywicklaw.com
875 Lowcountry Boulevard, Suite 204
Mount Pleasant, SC 29464
(843) 343-5092
Attorney for Respondent Phyllis Hufton

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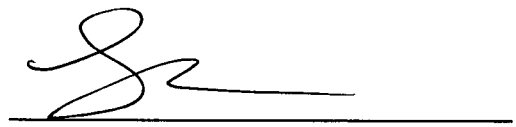
CERTIFICATE OF SERVICE

I, Lea E. Mason, an employee with Traywick & Traywick, LLC, do hereby certify that on April 23, 2015, I served a copy of the Final Brief of Respondent in the above-referenced case on the following individuals by standard US Mail:

Desa Ballard
Ballard & Watson, Attorneys at Law
P.O. Box 6338
West Columbia, SC 29171

Nelson Mullins
Meridian, 17th Floor
1320 Main Street
Columbia, SC 2920



Lea E. Mason, Paralegal

April 23, 2015

Charleston, South Carolina