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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby, Master-In-Equity

Case No. 2011-CP-22-0180
Appellate Case No. 2015-001125

Kennedy Funding, Inc. as predecessor-in-interest, and Respondents,
BNP Paribas,.....

v.

Pawleys Island North, LLC, Will Darwin Wheeler,
Peggy Wheeler-Cribb, and J. Mars Sapp, Defendants,
Of Whom Pawleys Island North, LLC, Will Darwin
Wheeler and Peggy Wheeler-Cribb are Respondents, and

J. Mars Sapp is the..... Petitioner.

RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Petition for Writ of Certiorari in this matter should be denied. None of the factors in Rule 242(b), SCACR exist to justify the issuance of the writ. There is no Court of Appeals dissent, no constitutional issue, no federal question, and no novel question of law as evidenced by the fact that the opinion was unpublished. Further, the opinion of the Court of Appeals regarding fraudulent conveyances and lien priorities is correct and does not conflict with precedent. Finally, no other "special and important" reason exists under Rule 242(b), SCACR warranting certiorari.

COUNTER QUESTIONS PRESENTED

- I. Did the Court of Appeals correctly decide the mortgage transaction between Pawley's Island North, LLC and Kennedy Funding, Inc. did not violate the Statute of Elizabeth?
- II. Even if Sapp is found to have an enforceable lien against the subject property, did the Court of Appeals correctly find that equity and the South Carolina Recording Statute dictate Kennedy Funding, Inc.'s lien is superior to Sapp's lien?

COUNTER STATEMENT OF THE CASE

This case arises out of a commercial mortgage foreclosure action and involves a dispute between alleged lien holders over the existence and priority of liens. Respondent Kennedy Funding, Inc. ("Kennedy") instituted this action by filing a Summons and Complaint on February 9, 2011, and the First Amended Complaint was filed by Respondent BNP Paribas, a successor-in-interest to Kennedy ("BNP"), on September 5, 2012. The Complaint sought to foreclose on a mortgage given by Respondent Pawleys Island North, LLC ("Pawleys") to BNP on two parcels of raw land located on Pawley's Island, South Carolina, (the "Property") and collect on a promissory note given by Pawleys to secure the mortgage. The suit additionally sought to collect on personal

guarantees given by Respondents Will Darwin Wheeler ("Wheeler) and Peggy Wheeler-Cribb ("Wheeler-Cribb") (collectively, "Guarantors"). The Amended Complaint alleged Petitioner J. Mars Sapp ("Sapp") may hold a lien arising out of a judgment he obtained against Wheeler but, if such a lien existed, it was junior to BNP's lien.

Sapp's original Answer did not assert any cross-claims or counter-claims but did request the Court find Sapp's lien to be a first lien and interest in the property. Based on this assertion of lien priority, BNP filed a motion for summary judgment requesting its lien be declared superior to Sapp's lien, if any. By Order dated March 5, 2012, Georgetown County Master-in-Equity Joe Crosby (the "Master") granted BNP's motion for summary judgment, ruling that, to the extent Sapp held a lien which attached to the Property, his lien was inferior to BNP's lien. The Court's ruling did not address the merits of Sapp's alleged lien. Sapp filed a motion to reconsider and the Court held a hearing on the motion to reconsider on August 13, 2012. The Court denied Sapp's motion to reconsider from the bench at the trial of the case on February 11, 2013.

After summary judgment was granted in BNP's favor and while Sapp's motion to reconsider was pending, Sapp responded to Plaintiff's First Amended Complaint by filing an Answer and Cross-Claim against Wheeler. Sapp asserted a lone cross-claim against Wheeler for violation of the Statute of Elizabeth, codified at S.C. Code §27-23-10(A), in which he contended that Wheeler's transfer of the Property to Pawleys constituted a fraudulent conveyance and that it and all subsequent transfers, including the mortgage given to BNP, should be voided. Sapp did not assert any counterclaim against BNP. On October 10, 2012, Pawleys, Wheeler and Wheeler-Cribb filed an Answer to Sapp's cross-claim in which they denied all material allegations set forth in Sapp's cross-claim. On

October 10, 2012, BNP filed a reply to Sapp's cross-claim asserting the Court's summary judgment Order barred Sapp from re-litigating the lien priority issue and additionally asserted several affirmative defenses.

On February 11, 2013, the Master conducted a non-jury trial. The Master denied from the bench Sapp's outstanding motion to reconsider the Master's summary judgment Order. By agreement, the parties admitted in to evidence all the trial exhibits contained in the record. BNP presented testimony from Harry Nullet, a BNP Managing Director, and Kevin Wolfer, Kennedy's CEO. Sapp testified on his own behalf but did not call any other witnesses. Pawleys, Wheeler and Wheeler-Cribb did not present any witnesses but did cross-examine Sapp. The Master took the matter under advisement and issued his Order and Judgment on June 7, 2013. In his Order and Judgment, the Master found Pawleys to be in default under the terms of the Mortgage and Promissory Note, found Wheeler and Wheeler-Cribb in default under the terms of the Guaranty, found BNP's mortgage to be a first lien on the Property, ordered the Property to be sold at a judicial sale, and ordered BNP was owed \$1,825,935.53, with interest continuing to accrue, pursuant to the terms of the Promissory Note and Guaranty. The Court denied Sapp's cross-claim finding that no fraudulent conveyance occurred and Sapp, therefore, had no lien interest in the Property.

Sapp filed a Notice of Appeal on June 27, 2013, appealing the Master's February 14, 2012 Summary Judgment Order and his June 7, 2013 Order and Judgment. Sapp subsequently filed an Amended Notice of Appeal confirming Pawleys, Wheeler and Wheeler-Cribb were also Respondents in the appeal. Judicial sale of the Property was scheduled for August 5, 2013. Prior to the sale, Sapp filed a motion to stay the sale on

June 28, 2013, based on the filing of his notice of appeal. The Court conducted a hearing on Sapp's motion to stay the sale and ruled that the sale would only be stayed if Sapp filed a bond in the full amount of BNP's judgment. Sapp did not file a bond, and BNP was the high bidder at the sale with a bid of \$1,500,000. Subsequently, the Master entered a Final Judgment on BNP's deficiency claim against Wheeler and Wheeler-Cribb for \$382,790.61.

On March 11, 2015, the Court of Appeals issued a unanimous unpublished opinion in which it affirmed in part and reversed in part the Master's Order. In reversing the Master in part, the Court of Appeals found that transfer from Wheeler to Pawleys Island North was a fraudulent conveyance. The Court of Appeals, however, affirmed the Master in part in finding that the mortgage transaction between Kennedy Funding and Pawleys Island North was not a fraudulent conveyance and that Kennedy's lien interest in the property was superior to Sapp's lien. Sapp filed a Petition for Rehearing which the Court of Appeals denied on April 27, 2015. Sapp then filed a Petition for Writ of Certiorari with this Court on May 26, 2015.

ARGUMENT

The South Carolina Appellate Court Rules provide that a “writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR; *see also State v. Lyles*, 381 S.C. 442, 443, 673 S.E.2d 811, 812 (2009) (“The Court has held it will grant certiorari to the Court of Appeals only where special reasons justify the exercise of that power.”) (citations omitted). Typically, the granting of certiorari is limited to cases where: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of

Appeals; (3) the decision by the Court of Appeals is in conflict with a prior decision of this Court; (4) substantial constitutional issues are directly involved; or (5) a federal question is included, and the decision by the Court of Appeals conflicts with a decision of the Supreme Court of the United States. *See* Rule 242(b), SCACR; *see also Lyles*, 381 S.C. at 444 n.2, 673 S.E.2d at 812 n.2. As explained below, the Court of Appeals’ ruling presents none of these factors and is consistent with longstanding precedent regarding fraudulent conveyances and lien priorities. Moreover, Sapp has not pointed to any other “special and important” reason that would warrant a review of the Court of Appeals’ decision.

1. The Court of Appeals decision is consistent with well settled law regarding fraudulent conveyances.

In South Carolina, a clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. *See, Oskin v. Johnson*, 400 S.C. 390, 396-97 (S.C. 2012) (citing, *Windsor Props., Inc. v. Dolphin Head Constr. Co.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998) (citations omitted)). Additionally, an action to set aside a conveyance under the Statute of Elizabeth is an equitable action. *Id.* at 397 (citing, *Future Grp., II v. Nationsbank*, 324 S.C. 89, 97 n. 6, 478 S.E.2d 45, 49 n. 6 (1996); S.C. Const. art. V, § 5.)

The Statute of Elizabeth provides:

Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures must be deemed and taken ... to be clearly and utterly void....

S.C. Code Ann. § 27-23-10(A) (2007). In interpreting this statute, our Courts hold conveyances shall be set aside under two conditions: First, where there was valuable

consideration and the transfer is made by the grantor with the actual intent to defraud; or, second, where a transfer is made without actual intent to defraud but without valuable consideration. *Oskin*, 400 S.C. at 397-98 (citing, *Future Group, II*, 324 S.C. at 96, 478 S.E.2d at 48-49; *McDaniel v. Allen*, 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975). Even where it is shown that the grantor has fraudulent intent, to “annul for fraud a deed based upon a valuable consideration [under the Statute of Elizabeth], it must not only be shown that the grantor intended thereby to hinder, delay or defraud creditors, but it must also appear that the **grantee participated in such fraudulent purpose.**” *McDaniel*, 265 S.C. at 242-43, 217 S.E.2d at 775-76 (emphasis added); *Windsor Props.*, 331 S.C. at 471, 498 S.E.2d at 860.

In analyzing Kennedy's loan to Pawleys, the Court recited in detail the arguments made by both sides as to whether the transaction violated the Statute of Elizabeth. Weighing the arguments, the Court properly determined Kennedy's loan was not fraudulent, citing eight distinct facts which established the loan from Kennedy to Pawleys was a bona-fide, arms-length transaction supported by valuable consideration. Having found valuable consideration supporting the loan, the Court cited facts establishing that Kennedy did not participate in a fraud. Building upon these findings, the Court correctly cited to *Kirton v. Howard*, 137 S.C. 11, 36, 134 S.E. 859, 868 (1926), as additional authority supporting its finding that the Kennedy loan was not fraudulent.

2. The Court's decision does not conflict with *Coleman v. Daniel*.

Sapp bases almost the entirety of his Petition on the argument that the Court of Appeals decision is inconsistent with this Court's ruling in *Coleman v. Daniel*. The Court of Appeals, however, correctly interpreted *Coleman* and distinguished it from the facts of

this case. In *Coleman*, the debtor was proven to be insolvent when he transferred virtually his entire estate to his daughter and son-in-law for roughly 58% of the appraised value. 261 S.C. 198, 204, 199 S.E.2d 74, 77 (1972). The transfer included the property where the debtor had lived his entire life and a separate secret agreement the debtor made with his daughter to continue living on the property rent free. *Id.* at 203, 199 S.E.2d at 76. The debtor admitted under oath that he was insolvent at the time of transfer. *Id.* at 206, 199 S.E.2d at 78. Under these facts, this Court found that the daughter and son-in-law's failure to inquire as to their father's indebtedness to plaintiff Coleman resulted in the knowledge of the debt being imputed to them and voided the transfer as a fraudulent conveyance. *Id.* at 211, 199 S.E.2d at 80.

By citing in detail the arguments Kennedy presented distinguishing *Coleman* from this matter, the Court of Appeals' opinion explained why this case does not involve any of the key facts which supported this Court's fraudulent conveyance finding in *Coleman*. First, this was an arms-length loan transaction between a lender based in New Jersey and a South Carolina limited liability company with no prior relationship, much less a familial relationship. (R. p. 178, line 22-p.179, line 10). Second, no property was sold or transferred to Kennedy; rather, Kennedy loaned Pawleys \$960,000.00 and received a mortgage *for that amount* on the Property (worth \$1,920,000.00 at the time of the loan) as security for the debt. Third, the borrower was not insolvent when the loan was executed, because the mortgage transaction left \$960,000.00 worth of equity in the Property, and the borrower received nearly \$400,000.00 in cash from the loan after payment of other

debt and fees.¹ Fourth, the borrower was not living on the property when the transaction closed. (R. p. 225). Finally, the borrower did not retain, via secret agreement, perpetual use of the property rent free. The Court of Appeals opinion notes in detail the factors which distinguish *Coleman* from this case and Sapp's argument to the contrary was properly considered and rejected. Ultimately, Sapp was unable to provide clear and convincing evidence of a fraudulent conveyance.

Not only did the Court of Appeals correctly distinguish *Coleman*, in affirming the Master's findings regarding the Kennedy mortgage transaction, the Court properly applied South Carolina law on fraudulent conveyances. Specifically, the Court of Appeals affirmed the Master's finding that "(1) the mortgage between Kennedy and Pawleys was an arms-length transaction and no familial or prior business relationship existed between Pawleys and Kennedy; (2) valuable consideration existed to support the mortgage; (3) Sapp did not prove by clear and convincing evidence that Kennedy participated in a fraudulent scheme, and (4) Kennedy was a good faith purchaser for value when it entered into the mortgage agreement with Pawleys and did not participate in a plan to defraud Sapp." (Ct. of Appeals Opinion). In affirming these findings based on the record provided on appeal, the Court of Appeals followed the test set forth in virtually every fraudulent conveyance case decided by this Court. *Oskin v. Johnson*, 400 S.C. at 397-98 735 S.E.2d at 463; *Future Grp., II*, 324 S.C. at 96, 478 S.E.2d at 48-49; *McDaniel*, 265 S.C. at 242-43, 217 S.E.2d 775-76; *Coleman*, 261 S.C. at 210, 199 S.E.2d at 80. In sum, the Court of Appeals reviewed the record, considered the facts and

¹ Other than presenting a *nulla bono* return from the Georgetown County Sheriff, Sapp did not present any other evidence regarding Wheeler's financial wherewithal at the time of the Kennedy loan or at the time Sapp obtained his judgment.

arguments presented by both sides, and correctly interpreted and applied South Carolina fraudulent conveyance law to affirm the Master's finding that the Kennedy mortgage was not a fraudulent conveyance. Nothing in the Court of Appeals opinion gives rise to an issue that would warrant certiorari being granted under Rule 242(b).

3. The Court of Appeals decision is consistent with well-settled law regarding lien priorities.

In determining lien priorities, the Court of Appeals correctly interpreted and relied on the Recording Statute, codified at S.C. Code Ann. § 30-7-10, and *Atlas Supply Co. v. Davis*, 273 S.C. 392, 256 S.E.2d 859 (1979), which both support this Court's finding that Kennedy's lien takes priority over Petitioner's lien. Petitioner contends that *Atlas Supply* and the Recording Statute are inapplicable in a fraudulent conveyance case, and incorrectly argues that the Statute of Elizabeth applies instead. In making this argument, Petitioner ignores the Court of Appeals' holding that the mortgage from Pawleys to Kennedy was *not* fraudulent and, therefore, the Statute of Elizabeth is not invoked. Because there was no fraudulent conveyance as between Pawleys and Kennedy, the Recording Statute and this Court's holding in *Atlas Supply* are applicable.² Here, Sapp filed suit against Wheeler on September 30, 2008, and *did not obtain a verdict against Wheeler until June 4, 2010*. The mortgage between Kenney and Pawleys was executed on April 29, 2009 and recorded on May 5, 2009 – in other words, fourteen months *before* Sapp obtained his verdict against Wheeler.

² Petitioner also argues that the Court of Appeals' reliance on the Recording Statute and *Atlas Supply* conflict with this Court's holding in *Leasing Enterprises, Inc. v. Livingston*, 294 S.C. 204, 363 S.E.2d 410 (Ct. App.1987); however, this argument also fails on the basis that the Court of Appeals found no fraudulent conveyance as to the Kennedy mortgage transaction.

Pursuant to the South Carolina Recording Statute,

all...instruments...encumbering [property]...are valid so as to affect the rights of subsequent creditors...only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated.

S.C. Code Ann. § 30-7-10. As stated above, Kennedy recorded its mortgage fourteen months before Sapp obtained his judgment and indisputably has a superior lien. Petitioner's petition does not, and cannot, negate the Recording Statute's application in light of the Court of Appeal's correct finding that the mortgage transaction was not fraudulent.

Atlas Supply provides further support for the superiority of Kennedy's mortgage. In *Atlas Supply*, the South Carolina Supreme Court held that a judgment lien awarded on the basis of a debt that was antecedent to the execution of a mortgage, was not within the protection of the recording statute. 273 S.C. at 395, 256 S.E.2d at 860. In *Atlas*, the judgment creditor actually recorded its lien two hours before the mortgage was recorded. *Id* at 393, 256 S.E.2d at 859. However, the Court granted priority to the mortgage on the basis that the statute awards protection to subsequent creditors who extend credit in reliance on the property being unencumbered, stating

a creditor who between the date of the execution of the mortgage and the date of its record entered judgment against the mortgagor on an obligation that had been created prior to the date of the mortgage was not within the protection of the statute because his extension of credit to the mortgagor was antecedent, not subsequent, to the execution of the mortgage.

Id. at 393, 256 S.E.2d at 860 (quoting *Prudential Insurance Company v. Wadford*, 232 S.C. 476, 102 S.E.2d 889 (1958)). There is no set of facts Sapp can argue, much less prove, which would allow his lien to pre-date Kennedy's lien. With no viable argument

regarding the Recording Statute, Petitioner simply re-argues that Kennedy's loan transaction was fraudulent and should be voided in an attempt to avoid the Recording Statute's clear priority rules. (Petition at pp. 11-14). Petitioner's re-argument of the fraudulent conveyance issue does not warrant certiorari being granted under Rule 242(b).

4. Sapp's remaining arguments do not satisfy any of the criteria under Rule 242(B).

The remaining arguments in Sapp's Petition do not meet any of the criteria under Rule 242(b) which would warrant granting certiorari. Sapp argues that, to the extent the Court of Appeals based its decision on Sapp's failure to file a *lis pendens*, the Court erred as Sapp does not believe he was entitled to file a *lis pendens* under the statute. (Petition at p. 10.) Whether Sapp was able to file a *lis pendens* or not was not outcome determinative in the Court's view. Instead, the Court of Appeals cited numerous facts which supported its finding that the Kennedy mortgage was not a fraudulent conveyance and the lack of a *lis pendens* was but one such factor.

Sapp also argues in his petition that the Court was wrong to rely on a letter from Pawleys Island North given to Kennedy prior to the closing in which Pawleys stated:

There is no action, suit, proceeding or investigation at law or in equity by or before any court, governmental instrumentality or other agency now pending or, to the best of our knowledge, threatened against the Borrower or the Guarantors or any of the Borrower's or the Guarantors' properties or rights which, if determined adversely to the Borrower or the Guarantors, would impair or materially affect (i) such entity's right to carry on its business substantially as now conducted, (ii) the value of the collateral securing the Loan Documents, (iii) such entity's ability to carry out its obligations under the Loan Documents to which it is a party, or (iv) the validity or enforceability of each of the Loan Documents executed by the Borrower or the Guarantors. Neither Borrower nor Guarantors are in default with respect to any order, judgment, writ, injunction, decree or demand of any court or governmental authority.

(Petition at p. 10) (emphasis added).

Sapp further argues the Court of Appeals erred in relying on Kevin Wolfer, Kennedy's CEO, who testified that Kennedy would not have closed on the loan without this representation. (Kevin Wolfer Depo. Tr. 38:21-24; R. p. 203, lines 21-24). Sapp contends these two facts cannot strip him of his right to collect his judgment by attaching and selling the property. This was not the Court of Appeals' ruling, however, as the Court of Appeals relied on the letter, Wolfer testimony and numerous other facts in determining that Kennedy did not participate in a fraud as would be required to void its mortgage interest.³ See *McDaniel*, 265 S.C. at 243–44, 217 S.E.2d at 776. In making this argument, Sapp points to no case from this Court which contradicts the Court of Appeals reliance on numerous facts supporting its finding that Kennedy's mortgage transaction should not be voided pursuant to the Statute of Elizabeth.

The Court of Appeals was clearly persuaded that an arms-length mortgage transaction, in which \$960,000 was loaned in exchange for a mortgage of the same amount on property worth \$1.92 million at the time of the transaction, was not fraudulent, where the transaction left the borrower with over \$1.3 million in cash and equity in the Property, and the borrower affirmed in writing under penalty of perjury that there were no suits which would negatively impact the Property. Sapp's repeated argument that Kennedy was on notice of his suit against Wheeler is of no moment. The Court of Appeals found valid consideration to support the Kennedy mortgage, a finding Sapp does not challenge in his petition. Under South Carolina law, a finding of valid consideration

³ Furthermore, Sapp failed to plead or prove that Kennedy engaged in any fraud, and Kennedy has previously asserted that this fact alone constituted an independent ground for the Court of Appeals to affirm the Master's Order. See *S. Carolina Nat. Bank v. Halter*, 293 S.C. 121, n.5, 359 S.E.2d 74, n.5 (Ct. App. 1987) ("Technically, we need go no further since [the creditor] failed to plead actual fraud on [grantor]'s part and participation in the fraud by [grantee].").

means a fraudulent conveyance can only occur if Kennedy knew about and participated in a scheme to defraud Sapp. *McDaniel*, 265 S.C. at 243, 217 S.E.2d at 776; *McElwee v. Kennedy*, 56 S.C. 154, 34 S.E. 86, 91-92 (1899). Following precedent, it was logical for the Court to reference the borrower's letter and Wolfer testimony as additional facts demonstrating Kennedy did not participate in a fraudulent scheme.

Finally, Sapp contends the Court of Appeals was confused and did not understand the issues. Sapp's Petition contends the Court of Appeals did not answer the right "Question" presented as Sapp would frame it. The Court of Appeals, however, did exactly as this Court has done numerous times before in deciding fraudulent conveyance cases. The Court of Appeals cited the applicable law, reviewed the relevant facts from the record, and, applying the facts to the law, determined Kennedy's mortgage should be upheld and given priority lien rights over Sapp's judgment. At its core, Sapp's Petition is not based on any issue which would meet the Rule 242(b) standard but is based on his dissatisfaction that the Court of Appeals was not persuaded by his arguments or his characterizations of the facts in the record. Sapp has not demonstrated that any aspect of the Court of Appeals' decision warrants review by this Court.

CONCLUSION

For the foregoing reasons, Kennedy and BNP submit that the Court of Appeals' decision affirming the Master's finding that Kennedy holds a valid lien on the property superior to any lien held by Sapp is consistent with precedent and presents none of the issues or characteristics that justify a grant of certiorari.

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Charleston, South Carolina

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PROOF OF SERVICE

I the undersigned Administrative Assistant of the law firm of Nelson Mullins Riley & Scarborough, LLP, attorneys for Kennedy Funding, Inc. as predecessor-in-interest, and BNP Paribas, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):


Pleadings: Return to Petitioner's Petition for Writ of Certiorari

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