

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM DILLON COUNTY
Court of Common Pleas

JUL 27 2015

SC Court of Appeals

Harry R. Easterling, Jr., Special Referee

Case No. 2012-CP-17-0060
Court of Appeals No. 2015-000985

Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP f/k/a
Countrywide Home Loans Servicing, LP..... Respondent.

v.

Shawn L. Bethea; South Carolina Department of Motor Vehicles, Defendants,
Of whom Shawn L. Bethea is the.....Appellant.

BRIEF OF RESPONDENT BANK OF AMERICA, N.A.

Trent M. Grissom
S.C. Bar No. 77718
MCGUIREWOODS LLP
201 North Tryon Street
Suite 3000
Charlotte, NC 28202
Tel: (704) 343-2000
Fax: (704) 444-8738

Attorney for Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the mobile home is a permanent fixture on the property.
- II. Whether the special referee properly granted summary judgment to Bank of America.

STATEMENT OF THE CASE

In November 2002, Shawn Bethea executed a promissory note for \$49,147 in favor of Countrywide Home Loans, Inc. ("Note"). (Compl. ¶ 4.) To secure repayment of this Note, he also executed a mortgage ("Mortgage") on the property located at 1317 Gordonville Court in Dillon, South Carolina. (*Id.* ¶ 5). Bethea ultimately defaulted on the Note, and Bank of America, N.A. (who had become the holder of the Note and Mortgage) sought to foreclose on the property, based on the Mortgage. (*See generally id.*)

Prior to Bethea's purchase of the lot and mobile home, the lot and mobile home were owned by Shirley McRae Davis. (Mikell Aff. 1.) After Davis purchased the lot and mobile home, she filed a Manufactured Home Affidavit with the Dillon County Tax Assessor's Office requesting that the land and home be taxed as one parcel. (*Id.*; *see also* Davis Manufactured Housing Aff.¹) In addition to the Manufactured Housing Affidavit, the mobile home is shown on a plat recorded in Book 29 at Page 194 of the Dillon County public registry, indicating that the mobile home is a permanent fixture to the real property. (Mikell affidavit p. 1; *see also* Recorded Plat.) Finally, in November 2001,

¹ This affidavit was filed in September 2000. S.C. Code § 56-19-510 (which allows a person to retire title to a mobile home by (1) making it a fixture on the land by removing the wheels, axles, and towing hitch and (2) filing an affidavit with the register of deeds) was not enacted until 2005. *See* S.C. Code Ann. § 56-19-510(A). Because this statute had not yet been enacted, Davis's affidavit had the effect of having the land and home taxed as one parcel, but did not legally retire the title to the home.

Davis executed a Deed in Lieu of foreclosure to LaSalle National Bank. That deed specifically referenced the mobile home in the legal description. (Deed in Lieu 1.)

Bethea purchased the mobile home and lot from LaSalle National Bank in November 2001. (Mikell Aff. 1.) Both the deed conveying the property to Bethea and the mortgage securing the loan specifically referenced the mobile home in their respective legal descriptions. (Bethea Deed 1; Bethea Mortgage 2.) Bethea refinanced the mortgage debt on the property twice following the purchase—the second of which resulted in the execution of the Note at issue here. (Mikell Aff. 1.) The mobile home was not specifically referenced in the mortgage document for the second refinance because it had been treated as a permanent fixture both by Davis and Bethea up to the time of that refinance. (*Id.* at 2.)

On July 23, 2004, Bethea filed a petition under Chapter 7 of the Bankruptcy Code. (Bankruptcy Petition 1.) As part of that proceeding, Bethea was obligated to list his real and personal property in the appropriate schedules of his petition. In “Schedule A – Real Property,” Bethea specifically listed his land and the mobile home as a real property asset. (Bankruptcy Sched. A.)

In 2010, Bethea discovered that the certificate of title to the mobile home was never transferred into his name following his purchase in 2001. (Mikell Aff. 2.) Initially, Bethea engaged Steven Mikell to assist him with having the certificate of title changed to his name and to remove the lien on the title from Alliance Funding, the lender that Davis used to purchase the home. (*Id.*) Ultimately, Bethea became frustrated with the time it was taking to clear up the title issue, so he terminated Mikell as his attorney. (*Id.*)

On March 21, 2011 (and after having terminated Mikell), Bethea mailed a one-page letter to various people and entities informing them that the mobile home located on his property should be removed or he would begin charging \$1,000 per month, plus a \$100 late fee, presumably for the storage of the home on his land. (Bethea Letter Mar. 21, 2011.) Bethea then filed this letter in the magistrate court for Dillon County, Case No. 2011-CV-1710100987, seeking a public sale of the mobile home. (Magistrate Summons Issued Aug. 31, 2011.) The magistrate court issued an order stating that the mobile home would be sold at auction on September 26, 2011, based on the storageman's lien found in S.C. Code § 29-15-10. (Magistrate Court Order.) Mr. Bethea was deemed to be the winning bidder at the sale. (Order of Sale.) Subsequently, the title to the mobile home was issued in the name of Shawn Lee Bethea on October 3, 2011. (Certificate of Title.) Even after getting the mobile home titled in his name, Bethea failed to make his monthly payments pursuant to the Note and Mortgage. (Compl. ¶ 14.)

After Bethea became delinquent on his payments, the Note was declared in default, with an unpaid balance of \$43,175.82 and accruing interest at a rate of 6.875% per annum. (*Id.* at ¶ 14.) On February 6, 2012, Bank of America filed a complaint for foreclosure of the Note and Mortgage. (*See generally id.*) In addition to the foreclosure claim, the complaint also sought declaratory relief asking the court to find that the 2001 Pioneer Mobile Home, Serial #PH1124GA17807AB was a permanent fixture and subject to Bank of America's mortgage lien. (*Id.* ¶¶ 17-29.)

Bethea, representing himself, initially moved to dismiss the complaint. (Def.'s Mot. to Dismiss.) Shortly thereafter, he filed an answer and counterclaims through counsel. (Answer and Countercl.) Bank of America moved to dismiss the counterclaims.

(Pl.'s Mot. to Dismiss.) Bank of America's foreclosure claim was referred to the special referee by order of the circuit court judge. (June 5, 2013 Order to Sep. and Refer.) The court held a hearing on Bank of America's motion to dismiss, ultimately granting that motion and dismissing the counterclaims. (Aug. 12, 2014 Order Granting Dismissal.)

Bank of America then sought summary judgment on its foreclosure claim. (Pl.'s Mot. for Summ. J. 1.) Again, a hearing was held on the motion, this time before the special referee, and again, the motion was granted. (Apr. 24, 2015 Order Granting Summ. J.) Bethea timely appealed that final judgment. (Notice of Appeal.)

STANDARD OF REVIEW

In reviewing a grant of summary judgment, this Court applies the same standard that the lower court applies pursuant to Rule 56(c), SCRPC. *Froneberger v. Smith*, 406 S.C. 37, 46, 748 S.E.2d 625, 629 (Ct. App. 2013). "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as matter of law." *Id.* (quoting *Turner v. Milliman*, 392 S.C. 116, 112, 708 S.E.2d 766, 769 (2011)). Once the moving party has satisfied its burden of showing that there are no genuine issues of material fact, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings." *Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010) (quoting *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990)).

Judicial estoppel is an equitable doctrine, dependent upon the facts and circumstances of each case. *Carigg v. Cannon*, 347 S.C. 75, 84, 552 S.E.2d 767, 772 (Ct. App. 2001). Application of the doctrine is in the discretion of the trial court. *Id.* An

abuse of discretion occurs only when the court's rulings "either lack evidentiary support or are controlled by an error of law." *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

ARGUMENT

Bethea's goal is to retain possession of the mobile home on the property, and his argument for retaining possession of the mobile home hinges on his contention that the mobile home was not a permanent fixture on the land and, thus, not subject to the Mortgage. This argument, however, has no merit. Bethea cannot rely on the 2011 magistrate court's judgment because that judgment is void. Moreover, the special referee was within his discretion to hold that Bethea was judicially estopped from arguing that the mobile home was not a permanent fixture based on Bethea's assertions in his bankruptcy proceeding. In light of these determinations, the only evidence in the record shows that the mobile home is a permanent fixture. Based on all of these conclusions, the special referee properly granted summary judgment to Bank of America.

I. The Mobile Home Is a Permanent Fixture.

A. Bethea Cannot Rely on the Magistrate Court's Judgment Because that Judgment Is Void.

The South Carolina Supreme Court has recognized that "[a] judgment of a court without subject-matter jurisdiction is void." *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005). Subject-matter jurisdiction, of course, "is the 'power to hear and determine cases of the general class to which the proceedings in question belong.'" *Id.* (quoting *Dove v. Gold Kist*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994)). Thus, it "is fundamental" to a court entering an order. *Badeaux v. Davis*, 337 S.C. 195, 205, 522

S.E.2d 835, 840 (Ct. App. 1999). Accordingly, when a court lacks this power but enters a judgment anyway, the lack of subject-matter jurisdiction is a basis to consider the judgment void. *Katzburg v. Katzburg*, 410 S.C. 184, 187, 764 S.E.2d 3, 5 (Ct. App. 2014).

In this case, the special referee correctly determined the magistrate court order was void for lack of subject-matter jurisdiction. (Apr. 24, 2015 Order Granting Summ. J. ¶ 21.) Although not clear in Bethea's magistrate court pleading that the title to land was in question, other documents and statements made by Bethea leave no doubt that he was attempting to resolve a title issue to his property: Both the deed and mortgage that Bethea signed specifically referenced the mobile home as part of the real property in the legal description. (Deed to Bethea 1; Bethea Mortgage 2.) Additionally, Bethea even admitted during the summary judgment hearing in this case that he purchased the mobile home and land as one unit, which means that resolving title to the mobile home implicated the title to real property. (Tr. p. 12, lines 7–9.) A magistrate court, however, has no jurisdiction to resolve title to real property. *See* S.C. Code Ann. § 22-3-20 (“No magistrate shall have cognizance of a civil action . . . [w]hen the title to real property shall come in question, except as provided in Article 11 of this chapter.”).² Therefore, the magistrate court's order resolving title to real property is void, as that court lacked jurisdiction to issue an enforceable judgment.³

² No provision of Article 11 applies to Bethea's magistrate court proceeding. *See* S.C. Code Ann. § 22-3-1110, *et seq.*

³ Although this case is not an appeal of the magistrate court's order, the special referee did correctly recognize that the storageman's provision of S.C. Code § 29-15-10 could not apply to Bethea's magistrate court complaint. That statute provides that “[a] proprietor, an owner, or an operator of any towing company, storage facility, garage, or repair shop, or any person who repairs or furnishes any material for repairs to an article

Because this judgment was void, Bethea cannot point to it as evidence that the mobile home was personal property, rather than a fixture to the real property secured by the Mortgage.⁴

B. The Special Referee Was Within His Discretion in Precluding Bethea from Arguing that the Mobile Home Was Not a Permanent Fixture.

Judicial estoppel protects the “the integrity of the judicial process.” *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). The doctrine “is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.” *Id.* The South Carolina Supreme Court has adopted a five-part test for the doctrine to apply:

- (1) two inconsistent positions taken by the same party or parties in privity with one another;
- (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
- (3) the party taking the position must have been successful in maintaining that position and have received some benefit;
- (4) the inconsistency must be part of an intentional effort to mislead the court; and
- (5) the two positions must be totally inconsistent.

Id. at 215–16.

may sell the article at public auction to the highest bidder if” certain conditions are met. S.C. Code Ann. § 29-15-10(A) (emphasis added). From the plain language in the statute, anyone making a claim pursuant to this provision must first be the owner or operator of storage facility or garage. Bethea does not fit this description, as he admitted during the summary judgment hearing before the special referee. (Tr. p. 60, lines 19–24.)

⁴ Bethea argues that Bank of America is prohibited from pursuing the foreclosure because it failed to respond to his magistrate court complaint. Because the magistrate court lacked subject-matter jurisdiction, that argument is ultimately irrelevant. But in any event, that argument fails because Bank of America was never properly served. The magistrate summons issued to Bank of America was addressed to a general post office box in Charlotte, North Carolina and not the agent for service of process or officer or managing agent, in violation of Rule 6(d)(3), SCRMC. (Magistrate Summons to Bank of America.)

The special referee barred Bethea “from denying that the mobile home is collateral under the mortgage” under the doctrine of judicial estoppel. (Apr. 24, 2015 Order Granting Summ. J. ¶ 20.) All five elements are satisfied here, so the special referee did not abuse his discretion by applying the doctrine.

First, the first and fifth elements are met: the same party has taken totally inconsistent positions. Bethea has taken the position that the mobile home was a permanent fixture on the real property in his 2004 bankruptcy proceeding. (Bankruptcy Sched. A; *see also* Apr. 24, 2015 Order Granting Summ. J. ¶ 20.) However, at the summary judgment hearing in this case, Bethea argued that the mobile home is personal property not subject to the mortgage lien upon which Bank of America was seeking to foreclose. (Tr. p. 9, lines 13–15; Tr. p. 68, lines 20–21; *see also* Appellant Br. 11.) These positions that Bethea has taken at different times are completely inconsistent with one another, thereby meeting the first and fifth requirements of the *Cothran* test.

As for the second element, in his bankruptcy proceeding, Bethea listed the mobile home and the land as a real property asset, which allowed him to remain in the home and the land to remain titled in his name. (Bankruptcy Sched. A.) Now, in a foreclosure hearing affecting the title to the same property, he took the position that the mortgage lien on real property does not apply to the mobile home because the mobile home is personal property. Because these proceedings both involve the property at 1317 Gordonville Court in Dillon and the mobile home, the two proceedings are related. *See, e.g., Quinn v. Sharon Corp.*, 343 S.C. 411, 415, 540 S.E.2d 474, 476 (Ct. App. 2000) (holding that this element of judicial estoppel was met when a party had claimed in earlier litigation related to a corporation that he was not the owner, but in the current litigation (not involving all

of the same parties as the earlier litigation) that same party had asserted that he was the owner).

Third, Bethea was successful in maintaining his position that the mobile home was a permanent fixture in the bankruptcy proceeding, and he benefited from taking this position that the mobile home and land were one asset in his bankruptcy proceeding as he was allowed to discharge the debt, making him immune to a deficiency judgment and able to continue living in the home. (Chapter 7 Discharge Order.) Thus, the third element of the *Cothran* test is satisfied.

Finally, Bethea's purpose in taking the position that the mobile home is personal property was to mislead the court in the foreclosure proceeding. Bethea offered no defense to the foreclosure action itself. Rather, he simply argued that he should be able to keep his mobile home. (*Cf.* Appellant's Br.) Given the fact that he took advantage of treating the mobile home as a permanent fixture by paying lower taxes on the real property as his homestead up until the special referee's entry of summary judgment (Tr. p. 30, lines 22–25), the only reasonable conclusion that can be drawn from Bethea's position in this case is that he wanted to keep the mobile home out of the foreclosure. Despite telling the bankruptcy court that the mobile home was a permanent fixture, in this case, Bethea used the void magistrate court judgment in an attempt to mislead the special referee into ruling that the mobile home was his personal property. The fourth element of the *Cothran* is, therefore, met.

Ultimately, Bethea's irreconcilable positions on whether the mobile home was a permanent fixture is the type of inconsistent assertion that the doctrine of judicial estoppel seeks to prevent. The special referee was well within his discretion to apply the

doctrine here and preclude Bethea from asserting that the mobile home was not a permanent fixture.

C. The Only Evidence in the Record Makes Clear that the Mobile Home Is a Permanent Fixture.

The special referee's determination that the mobile home on Bethea's land was a permanent fixture and part of the collateral secured by the mortgage is the only conclusion that any evidence in the record supports. (Apr. 24, 2015 Order Granting Summ. J. ¶ 23.)

During the hearing, nine documents were offered into evidence demonstrating that the mobile home was always treated as a permanent fixture upon Bethea's property, including five from the public record. The documents include: (1) the recorded plat showing the mobile home on the parcel of land, (Recorded Plat); (2) the manufactured housing affidavit that Davis filed, requesting that the mobile home and land be taxed as a single parcel, (Davis Manufactured Housing Aff.1-2); (3) the deed in lieu that Davis gave to LaSalle National Bank with the mobile home referenced in the legal description, (Deed to LaSalle 1); (4) the deed from LaSalle National Bank to Bethea with the mobile home referenced in the legal description, (Deed to Bethea 1); (5) the mortgage executed by Bethea from his initial purchase of the property with the mobile home referenced in the legal description, (Bethea Mortgage 2); (6) the affidavit of Steven Mikell in which he testified that the mobile home and land had always been treated as one parcel, (Mikell Aff. 2); (7) Bethea's loan application executed in November 2002 in which the mobile

home is listed as part of the real estate, (Bethea Loan App. 3); (8) the tax receipt from the Dillon County Treasurer showing taxes being paid on the land and an improvement, (Dillon Co. Tax Receipt); and (9) Schedule A from Bethea's bankruptcy filing that lists the mobile home and parcel of land as a real property asset, (Bankruptcy Sched. A.) In addition to these nine documents, Bethea admitted under oath during the hearing that he intended to purchase the home and the land as one parcel. (Tr. p. 12, lines 7-9.) Finally, Bethea had claimed the homestead exemption on his taxes for years. (Tr. p. 39, lines 1-2.)

In the face of this overwhelming evidence, Bethea pointed to no admissible evidence to support his contention that the mobile home was not a permanent fixture. (Tr. p. 74, lines 15-21.) Therefore, there was no genuine dispute over whether the mobile home was a permanent fixture and subject to the Mortgage, and the special referee properly analyzed Bank of America's summary judgment motion based on the fact that the mobile home was a permanent fixture.

II. Because the Mobile Home Is a Permanent Fixture and Subject to the Mortgage, The Special Referee Properly Granted Summary Judgment to Bank of America.

The special referee correctly granted summary judgment for Bank of America. The evidence clearly established that Bank of America held the Mortgage on the property (which includes the mobile home, as a permanent fixture), Bethea defaulted on the terms of the Note, and under the terms of the Note and Mortgage, Bank of America is entitled foreclose on the property.

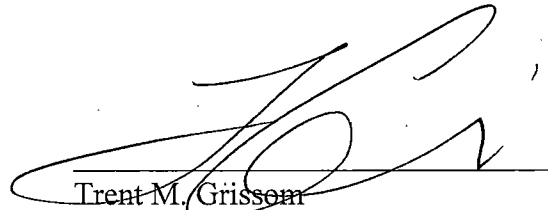
Bethea offered no evidence to contradict these simple yet critical facts. In fact, his entire argument on appeal is really focused on whether the mobile home is a

permanent fixture. He points to no evidence that, once the special referee found that the mobile home was a permanent fixture, could have shown that summary judgment was improper. Indeed, there is no evidence to which Bethea can point to make such an argument.⁵ Without any evidence to which he can point, he cannot show that summary judgment was improper. *Cf. Hoard ex rel. Hoard*, 387 S.C. at 549 (recognizing that a party “may not rest upon the mere allegations or denials of his pleadings” at summary judgment).

CONCLUSION

The special referee’s judgment should be affirmed.

July 24, 2015.



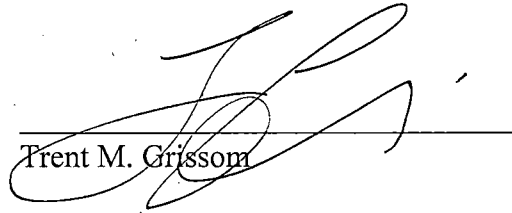
Trent M. Grissom
S.C. Bar No. 77718
MCGUIREWOODS LLP
201 North Tryon Street
Suite 3000
Charlotte, NC 28202
Tel: (704) 343-2000
Fax: (704) 444-8738

Attorney for Respondent

⁵ Even if such evidence theoretically did exist, this Court should have no obligation to scour the record “to ferret out the facts” to which Bethea could have theoretically pointed but has not. *Cray Commc’ns, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 396 (4th Cir. 1994).

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 208(b), SCACR.


Trent M. Grissom

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The undersigned certifies that this brief was served on Appellant by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

Shawn L. Bethea
1317 Gordonville Court
Dillon, SC 29536

This the 27th day of July, 2015.


Trent M. Grissom

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SC Court of Appeals

McGuireWoods LLP
Fifth Third Center
201 North Tryon Street
Suite 3000
Charlotte, NC 28202
Tel 704.343.2000
Fax 704.343.2300
www.mcguiirewoods.com

McGUIREWOODS

Muriel Powell
Direct Telephone: 704-373-8959

MUPowell@McGuireWoods.com
Direct Facsimile: (704) 373-8935

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Re: ***Bank of America, N.A. v. Shawn L. Bethea***
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Dear Ms. Kitchings:

Enclosed please find an original and (1) copy of Respondent Bank of America, N.A.'s Brief, as well as Respondent's Designation of Matter to be Included in Record on Appeal, regarding the above-captioned matter.

Upon receipt, kindly file the originals and return the conformed copies to my attention in the postage-paid envelope provided for your convenience.

Please feel free to contact me should you have any questions. Thank you for your assistance.

Sincerely,

MCGUIRE WOODS LLP


Muriel Powell
Paralegal

/MP
Enclosures
c: Shawn L. Bethea (w/encls)

ORIGIN ID: QWGA (704) 343-2000
MURIEL POWELL
MCGUIREWOODS LLP
201 NORTH TRYON ST
SUITE 3000
CHARLOTTE, NC 28202
UNITED STATES US

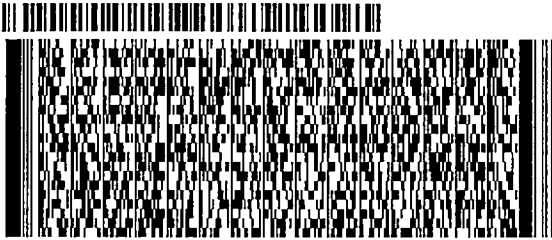
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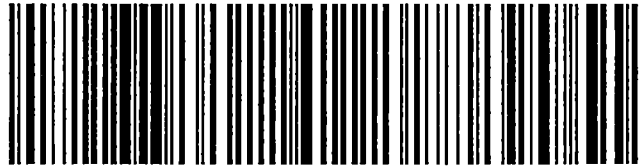
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