

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Clyde N. Davis, Jr., Special Referee

Case No. 2009-CP-46-03996
Appellate Case No. 2013-001930

JPMorgan Chase Bank, National Association, Respondent,

v.

Leah B. Sample and JP Morgan Chase Bank, National
Association s/b/m to Providian National Bank, Defendants

Of Whom Leah B. Sample is Appellant.

Return to Appellant's Petition for Rehearing

Pursuant to this Court's letter dated July 30, 2015, Respondent JPMorgan Chase Bank, National Association ("Chase") files this return to the petition for rehearing of Appellant Leah B. Sample ("Sample") as to the Panel's unanimous, unpublished opinion of JPMorgan Chase Bank, National Association v. Leah B. Sample, Op. No. 2015-UP-361 (S.C. Ct. App. filed July 15, 2015) (Shearouse Adv. Sh. No. 27 at 10) ("the Opinion"). The petition should be denied because Sample fails to raise any issue that the Panel overlooked or misapprehended in rendering the Opinion. To the contrary, the Panel considered and rejected the argument advanced by Sample in the petition.

Relevant Factual Background

This appeal involves the denial of Sample's motion to set aside a foreclosure sale. Sample claimed that Chase failed to properly serve Sample's counsel with notice of the foreclosure sale. The trial court rejected that claim. This Court affirmed. A recap of the factual history in this matter illustrates that affirmance was proper.

Chase initiated this foreclosure action against Sample in September 2009. {Special Referee's Order and Judgment of Foreclosure and Sale p. 2; R. 4}. Sample was represented at all times in the litigation her husband. At the outset of the action, Sample's counsel provided an address of Post Office Box 12340, Rock Hill, South Carolina, as counsel's address for service.¹ {Transcript p. 3-4; R. 21-22}. Sample's counsel provided no other address to Chase's counsel thereafter. As a result, Chase served the foreclosure notices and the Notice of Sale at that last known address of Sample's counsel. {Transcript of Hearing dated May 23, 2013, p. 8; R. 26}.

The special referee entered a foreclosure judgment in favor of Chase and directed sale of the property in December 2009.² {Special Referee's Order and Judgment of Foreclosure and Sale; R. 3-12}. Thereafter, the special referee noticed the sale of the property for February 2013. {Notice of Sale; R. 18}. Chase served the

¹ Counsel for Sample admitted that this Rock Hill Post Office Box address was the address provided to Chase "when I made my first appearance or notified counsel that I was involved in the case." {Transcript p. 3-4; R. 21-22}.

² Prior to the sale, the action was stayed to allow the parties to participate in foreclosure intervention per Chief Justice Toal Administrative Order 2011-05-02-11. Chase served the Notice of Mortgagor's Right to Foreclosure Intervention on counsel for Sample at his last known address. {Notice of Mortgagor's Right to Foreclosure Intervention, Certificate of Service; R. 17}. Notably, Sample received this notice, which was sent to the same address of her counsel as the Notice of Sale.

Notice of Sale on Sample's counsel at his last known address and served the notice of sale at Sample's home address. {Transcript p. 8; R. 26}. Sample's counsel admitted to the special referee that Sample still lived in the home where Notice of Sale was mailed. {Transcript p. 3; R. 21}.³ Neither Sample nor her counsel appeared at the sale. {Transcript p. 9; R. 27}.

After the sale, Sample filed a motion to set aside the foreclosure sale. {Motion to Set Aside; R. 13}. Sample argued she did not receive the Notice of Sale because her counsel changed offices since the inception of the action, and Chase failed to serve the Notice of Sale on the current address as required by the Attorney Information System ("AIS"). {Motion to Set Aside p. 1; R. 13}. The record belied Sample's argument.

The trial record established that Sample's counsel moved office several times during the pendency of the foreclosure action. The record showed that Sample's counsel never informed Chase of the relocation of his office. In fact, Sample's counsel acknowledged at the hearing that he had moved offices several times since the inception of this action.

From the inception of the action to the sale, Sample's counsel used, at a minimum, three different addresses. At the inception of the foreclosure, Sample's counsel used the post office box address for service.⁴ {Transcript p. 3-4; R. 21-22}. Sample's counsel then moved to an address in Fort Mill, South Carolina, in April 2010. {Transcript p. 4; R. 22}. Counsel did not inform Chase of this move or any new

³ Counsel further admitted that Sample and counsel received the notice of the hearing on the motion to set aside at the home address addressed to Sample. {Transcript p. 17; R. 35}.

⁴ Chase served Sample at that address with all notices, including the Notice of Sale.

address associated with that move. Sample's counsel moved again sometime in 2011 to another address in Rock Hill, South Carolina. {Transcript p. 5-6; R. 23-24}. Counsel again did not inform Chase of this move or any new address associated with that move.⁵

The trial court denied the motion to set aside the foreclosure sale. The trial court found (1) that Chase properly served counsel for Sample at his last known address pursuant to Rule 5(b)(1), SCRCP, and (2) that counsel for Sample failed to provide any other address to Chase for service. {Order Denying Motion to Set Aside p. 1-2; R. 1-2}. This Court affirmed in an unpublished opinion.

Argument

In the petition, Sample again alleges the Panel overlooked the fact the foreclosure sale should have been set aside because Sample counsel's address in the Attorney Information System "is the proper address for serving an attorney" and notice of the sale was not sent to that address. See Petition p. 2-3. This argument is manifestly without merit and does not present a basis for rehearing.

1. Sample presented this argument to the Panel in her appellate briefing. See Petition p. 3 ("As stated in Appellant's Final Brief . . ."). Thus, the Panel previously had the opportunity to review, weigh, and reject the argument raised in the petition. The argument should be rejected on this basis alone. See Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (holding it

⁵ Sample's counsel shifting addresses has continued through this appeal. Counsel provided a Rock Hill address on the Notice of Appeal. {Notice of Appeal; R. ____}. After dismissal of the appeal, counsel sought reinstatement and provided a new address in Rock Hill for his office. See Motion to Reinstate.

is not “the purpose of a petition for rehearing to have the case tried in the appellate court a second time”).

2. Sample’s reliance on the Attorney Information System is misplaced for several reasons. As an initial matter, Sample provides no authority for the proposition that the Attorney Information System supplanted the normal rules of service⁶ or relieved him of his obligation to inform counsel for Chase of his change in address. Thus, Sample has abandoned this argument because she does not cite any authority to support her claim. See, e.g., State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (“An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority”); Broom v. Jennifer J., 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (finding an issue abandoned where the party’s brief cited minimal authority and presented no argument as to how the ruling was an abuse of discretion or constituted prejudice pursuant to applicable authority).

Second, the AIS order affords no relief to Sample. Sample argument fails to understand that the AIS was not fully operational at the time of service of the Notice of Sale in this matter. The AIS order, relied upon by Sample in the petition, set forth an effective date of November 18, 2011. See Supreme Court Administrative Order 2011-10-17-01. The AIS order plainly and unambiguously allowed South Carolina attorneys until “November 18, 2011” to “log-on, verify, and update their contact information on the AIS.” Id. Attorneys had until that date to alter, change, or update their information. Thus, any information contained on AIS could not be considered accurate or reliable until the effective date of November 18, 2011.

⁶ As this Court properly held, Chase served Sample via Rule 5(b)(1), SCRCPP, at her counsel’s last address known to Chase.

Chase effectuated service of the Notice of Sale on Sample, through her attorney, on June 7, 2011, via Rule 5(b)(1), SCRCP. That was 164 days prior to the effective date of AIS. Chase could not be expected to rely on information in a system that was subject to change for another 164 days. Therefore, Sample's argument that the AIS provides "the proper address for serving an attorney" lacks merit. Chase was correct to serve Sample's counsel at the last address known to Chase via Rule 5(b)(1), SCRCP.

The trial court correctly found that it was incumbent on Sample's attorney to notify counsel for Chase of any change in address and that AIS did not obviate that requirement. The Panel properly rejected Sample's unsupported argument to the contrary. The petition for rehearing should be denied.

3. Even if Sample could argue that AIS supplanted the normal rules of service under Rule 5(b)(1), SCRCP, Sample's argument still fails to provide a basis for rehearing. First, South Carolina law contains no requirement that a party to a foreclosure action be given personal notice of a judicial sale. See Cumbie v. Newberry, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968); Peoples Fed. Sav. & Loan Assn. v. Graham, 291 S.C. 178, 182, 352 S.E.2d 511, 514 (Ct. App. 1987).

In Graham, this Court addressed this same issue in the context of a foreclosure sale. After the plaintiff purchased the property at a foreclosure sale, Graham and two lien holders moved to have the foreclosure sale set aside based on the fact that they were not served with Notice of Sale. Id. at 180, 352 S.E.2d at 512. The trial court denied the motion, reasoning the lack of service "is not the sort of unfairness which will void the sale . . . the lack of personal service [is] insufficient grounds upon which to vacate the judicial sale." Id. at 181, 352 S.E.2d at 513. This Court affirmed,

holding “there is no requirement of law that parties to a suit for foreclosure be given personal notice of a judicial sale.” Id. at 182, 352 S.E.2d at 514. Thus, Chase had no obligation to serve the Notice of Sale on Sample’s counsel either by Rule 5(b)(1), SCRPC, or by the address in the AIS.

Second, Chase sent Sample the Notice of Sale to an address other than her counsel’s address. In addition to serving Sample’s counsel, Chase sent the notice of sale to Sample (and to her attorney, who is her husband) at her home address. Chase presented evidence that the notice was mailed to Sample at her residence. {Transcript p. 8; R. 26}. Thus, the burden of proof shifted to Sample to rebut the presumption of receipt. Once evidence of mailing is shown, the burden of proof shifts to the party claiming that he did not receive a mailing to offer evidence to rebut a presumption of receipt. See Bakala v. Bakala, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003) (“Evidence of mailing establishes a rebuttable presumption of receipt.”); Foster v. Ford Motor Credit Co., 302 S.C. 450, 452, 395 S.E.2d 440, 441 (1990) (“Evidence that a letter is properly addressed and mailed raises a presumption it was received by the addressee”). Simply stating she did not receive the notice failed to overcome this presumption. Notably, Sample’s counsel admitted to the special referee that (1) Sample still lived in the home where notice was mailed {Transcript p. 3; R. 21}, and (2) Sample and counsel received other notices in the case at the home address. {Transcript p. 17; R. 35}. Therefore, Sample received the Notice of Sale at her home address.

4. Even if Sample could establish that she failed to receive the Notice of Sale through service on her counsel or at her home address, Sample’s argument remains

unavailing and fails to provide a basis for rehearing because Sample failed to demonstrate any resulting prejudice from the purportedly deficient service.

Our rules require a party claiming inadequate notice to demonstrate prejudice resulting from the insufficient notice. Gardner v. S.C. Dept. of Revenue, 353 S.C. 1, 15, 577 S.E.2d 190 (2003); Ballenger v. S.C. Dept. of Health & Envtl. Control, 331 S.C. 247, 500 S.E.2d 183 (Ct. App. 1998). “To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her case.” Chastain v. Hiltabidle, 381 S.C. 508, 518, 673 S.E.2d 826, 831 (Ct. App. 2009) (citing Gardner, 353 S.C. at 14, 577 S.E.2d at 197). “Even where a party receives no notice, he must establish that, had he received notice, he would have taken pertinent action and could have reduced his liability.” Gardner, 353 S.C. at 15, 577 S.E.2d at 197.

In this matter, Sample failed to argue or otherwise introduce any evidence of prejudice to the trial court. Sample offered no evidence or argument that she would have attended the sale, bid on the property, or otherwise done anything different than that which occurred in this matter had she received notice. In fact, Sample never even mentioned the prejudice requirement in her motion to set aside the foreclosure sale or in argument to the special referee. Thus, the trial court properly denied the motion to set aside the foreclosure sale. The Panel correctly affirmed. The petition for rehearing should be denied.

Conclusion

Sample's rehearing argument lacks merit. Any purported lack of service of the Notice of Sale cannot provide a basis to set aside the foreclosure sale, as set forth herein. As a result, the Panel properly affirmed the trial court's order. The petition for rehearing should be denied.

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PROOF OF SERVICE

I, the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for JP Morgan Chase Bank, National Association, do hereby certify that I have served all parties 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 Appellant's Petition for Rehearing

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August 5, 2015