THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Civil Action Number 2010-CP-22-1583
Case Tracking Number 2011198986

Wachesaw Plantation East Community Services Association, Inc., ... Respondent,

v.

Todd C. Alexander, ... Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Wachesaw Plantation East Community Services Association, Inc. commenced this action to foreclose a homeowners association lien for $761.00 in past due assessments and late fees. The action was referred to Joe M. Crosby as Master-in-Equity. A hearing was held and a judgment of foreclosure and sale was issued.

Todd Alexander failed to bid at the foreclosure sale to protect his interests in the property. A third party bidder placed the high bid.

Todd Alexander tendered payment of the judgment and moved to vacate the sale before the sale was completed by full compliance with the bid. The Master-in-Equity denied the motion to vacate the sale.

FACTS

In 2001 Todd Alexander paid $263,500.00 for the house in Wachesaw Plantation East. (Transcript of Testimony Ex. A) The house was purchased for his father and has been unoccupied since June of 2006. Todd Alexander hired Coastal Home Watch LLC, a property management company, to inspect the house bi-weekly and to maintain the property and grounds. (Alexander Affidavit p. 3) The present market value of the house is $316,800.00 according to the Georgetown County Tax Assessor. (Order p. 6)

When Todd Alexander was notified by the homeowners association's attorneys that a lien had been placed against the house, he believed that he could easily resolve the matter when his health returned to a more stable condition and he was better able to focus on financial matters. (Alexander Affidavit p. 3) He suffers from dilated cardiomyopathy as a result of cardiac sarcoidosis and has frequent hospitalizations for related heart and organ failure and secondary illnesses. (Alexander Affidavit p. 3) The amount claimed by the homeowners association was trivial compared to his equity in the house.

Todd Alexander continued to pay regime fees to the homeowners association. (Alexander Affidavit pp. 3-4) He did not know that a foreclosure decree had been issued or that the property had been scheduled for sale. (Alexander Affidavit p. 4) He was hospitalized from May 28, 2011 through June 10, 2011 for ablation surgery to correct chronic arrhythmias. (Alexander Affidavit p. 2) On June 7, 2011, the day after the sale, copies of the foreclosure decree and notice of sale were brought to his hospital room. (Alexander Affidavit p. 4) He had no knowledge of the foreclosure sale until June 7, 2011, the day after the sale. (Alexander Affidavit p. 4)

A third party placed the high bid at the sale. The third party bid of $181,000.00 was $135,000.00 less than the tax valuation of the house.

Todd Alexander tendered payment in full to the homeowners association's attorney on June 16, 2011. (Smith Affidavit p. 1) The homeowners association's attorney declined the tender because of concern about potential liability to the third party bidder. (Smith Affidavit p. 1) The motion to vacate the sale was filed and served on June 17, 2011 reaffirming that Todd Alexander is ready, willing and able to pay in full the judgment in this action. (Smith Affidavit p. 1) The third party bidder did not comply with his bid until June 24, 2011. (Smith Affidavit p. 1) A deed was not issued by the Master-in-Equity until after the motion to vacate sale was denied.

ARGUMENTS

1. THE MASTER-IN-EQUITY ERRED IN NOT VACATING THE JUDICIAL SALE BECAUSE THE SALE PRICE WAS INADEQUATE AND THE SALE WAS ACCOMPANIED BY OTHER FACTS WARRANTING THE INTERFERENCE OF THE COURT.

The Master mistakenly concluded that, "In the affidavits filed by Defendant in support of this motion, no excusable neglect is asserted." (Order p. 4) The undisputed evidence in that Todd Alexander did not know of the foreclosure hearing, the foreclosure decree or the judicial sale until the day after the sale because of his illness and hospitalizations. Todd Alexander's failure to bid at the judicial sale to protect his interests in the property was excusable neglect under the substantial South Carolina case law concerning vacating judicial sales.

In *Bonham v. Cave*, 102 S.C. 308, 86 S.E. 681 (1915) Bonham foreclosed a mortgage given by Cave. Bonham's attorney was unable to attend the foreclosure sale and asked his law partner to bid up to the amount secured by the mortgage. The law partner stopped bidding at $1,300.00 and a third party bid $2,500.00. After the sale Bonham's attorney learned that his law partner had mistakenly allowed the property to be sold for less than the amount secured by the mortgage and moved to set aside the sale. The trial court denied the request. The Supreme Court reversed and vacated the sale.

In *Saluda Land & Timber Co. v. Saluda Crushed Stone Co.*, 172 S.C. 544, 174 S.E.2d 592 (1934) a foreclosure sale was ordered with the bidding to remain open for thirty days. On the last day for bidding there was confusion as to where the bids would be received. Two bidders went to different locations and both bidders asked that their bid be declared the only valid bid. The Circuit Court ordered that the sale be set aside and the property reoffered for sale. The Supreme Court affirmed.

In *Poole v. Jefferson Standard Life Ins. Co.*, 174 S.C. 150, 177 S.E. 24 (1934) the insurance company foreclosed a mortgage from Standard Building Company. A deficiency judgment was requested so the bidding remained open for thirty days. On the last day for bids, Poole went to the Master's office and placed a bid of $500.00 which was entered on the sales book. The same morning the insurance company's attorney went to the Master's office. The attorney spoke with the Master's clerk as the Master was temporarily absent. The bidding closed at noon and the Master notified Poole that he was the high bidder. When the Master returned from lunch about 3:00 PM he found a letter on his desk from the insurance company's attorney offering a bid of $4,000.00. The Master notified both parties that he would not issue a deed to either party until the matter was resolved.

The Circuit Court issued an order confirming the bid of the insurance company and directing the Master to issue a deed. The Supreme Court did not affirm the Circuit Court's order since the insurance company had not made a proper bid.

The Supreme Court began its analysis by quoting from *Farr v. Gilbreath*, 23 S.C. 502: "It is the policy of the law to sustain judicial sales when it can be done *without violating principle or doing injustice*." (emphasis in original) *Poole,* 177 S.E. at 26.

The Supreme Court stated: "It is true that the rule is well settled that mere inadequacy of price is not sufficient ground for setting aside a judicial sale, but inadequacy of price, coupled with other incidents affecting the sale, may be sufficient ground." citing *Bonham v. Cave*, 102 S.C. 308, 86 S.E. 681. *Poole*, 177 S.E. at 27. The Supreme Court found the failure of the Master's clerk to inform the Master of the attorney's visit was an incident warranting setting aside the judicial sale.

The Supreme Court noted the discrepancy between Poole's bid of $500.00 and the insurance company's bid of $4,000.00 and ordered that the mortgaged property be resold.

In *Henry v. Blakely*, 216 S.C. 13, 56 S.E. 2d 581 (1949) Henry foreclosed a chattel mortgage on an automobile. The notice of sale provided the sale would take place at the Chester County Courthouse. Henry and his attorney were at the front of the courthouse at the hour and on the day sales (real estate by the Clerk of Court and chattels by the Sheriff) were advertised to be made. When the sale of real estate was completed and the Sheriff did not make an appearance, Henry and his attorney went to the Sheriff's office. There they learned that the chattel sale had been held in the rear of the courthouse while real estate was being sold in the front of the courthouse and that the automobile had been sold to a third party for $82.50. Henry's tender of $82.50 to the third party was refused.

Henry petitioned to set aside the sale on the grounds of excusable neglect and the inadequacy of the sale price. The Circuit Court declared the sale valid and that the third party bidder was entitled to possession of the automobile. The Supreme Court reversed stating:

> "As has been said time and again in cases involving the setting aside of judicial sales, it is the policy of the Courts to uphold such sales when regularly made, and when it can be done without violating principle or doing injustice; and that mere inadequacy of price, unaccompanied by other circumstances which would invoke the exercise of the Court's discretion is not sufficient, unless, perhaps, it is so great as to raise a presumption of fraud or to shock the conscience of the Court."
>
> 216 S.C. at 18, 56 S.E.2d at 583

The Supreme Court concluded that there was a misunderstanding between the Sheriff's office and Henry's attorney as to the place at the courthouse where the sale would occur and that it would work on injustice to declare the sale valid. Therefore a resale of the automobile was ordered.

Spillers v. Clay, 233 S.C. 99, 103 S.E.2d 759 (1958) arose from an action for the partition and sale of real estate. The sale was held in the court room at the Greenville County Courthouse. A large crowd was present. Clay, the attorney for several of the defendants in the partition action, thought that he had the high bid at $2,400.00. The auctioneer announced that Spillers, a third party bidder, was the high bidder at $2,500.00. Clay had not heard Spillers' bid.

Clay petitioned the Circuit Court to vacate the sale and readvertise the property. The Circuit Court issued an order setting aside the sale. The Supreme Court noted that evidence in the record suggested that the property was worth more than Spillers' high bid and said:

> "As stated in *Brownlee v. Miller*, 208 S.C. 252, 37 S.E.2d 658, the rule is well settled that inadequacy of price, unless so gross as to shock the conscience of the court, or accompanied by other circumstances warranting the interference of the court, will not justify the setting aside of a judicial sale. But it does not follow that the disparity between the accepted bid and the claimed value of the property may not be considered in light of the other circumstances. On the contrary, the rule as before stated clearly contemplates that where there are other circumstances tending to show that the sale should, in good conscience, be set aside, disparity between the accepted bid and the fair value of the property as disclosed by the evidence is a property factor to be considered by the court in arriving at its decision."
>
> 233 S.C. at 104, 103 S.E.2d at 761

The disparity between the accepted bid and the claimed value of the property combined with Clay's misapprehension of the bidding and the possibility of haste in conducting the auction were held sufficient to vacate the sale.

In *Investors Savings Bank v. Phelps*, 303 S.C. 15, 397 S.E.2d 780 (Ct. App. 1990) the bank foreclosed a mortgage on which a balance of $52,369.80 was due. The bank bid $500.00 at the sale. Because a deficiency judgment was sought, the bidding remained open for thirty days. A third party bid $510.00 on the thirtieth day. The bank moved to set aside the sale and the Master granted the

motion on the ground that the successful bid was so grossly inadequate as to shock the conscience. The Supreme Court agreed and affirmed.

In *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 662 S.E.2d 424 (Ct. App. 2008) the bank failed to bid at the mortgage foreclosure sale to protect its interest in the property. A third party submitted the high bid of $3,000.00. The Court of Appeals held that the record contained sufficient evidence of the value of the property to support vacating the sale and proof of excusable negligence was not required.

In the present case the difference between the fair market value of Todd Alexander's house and the third party bid is $135,000.00. This difference is substantial in both absolute terms and in relative terms. In absolute terms the difference is greater than any of the cases previously discussed.

In the present case there are other factors warranting vacating the sale. This is an action to enforce a homeowners association lien for $761.00 in assessments and late fees. (Transcript of Testimony Ex. C) Todd Alexander, a resident of Pennsylvania with no experience in foreclosures, did not recognize that he could lose the house because of a $761.00 homeowners association lien. (Alexander Affidavit p. 1) His medical conditions cause him to experience periods of extended hospitalization, repeated emergency room visits, confinement and rehabilitation. (Alexander Affidavit p. 2) He believed he could easily resolve the matter once his health returned to a stable condition and he could focus on the issue. (Alexander Affidavit p. 3) He believed that if there was a serious issue concerning his house the homeowners association or his property management company would call him. (Alexander Affidavit p. 4) On the day of the sale, Todd Alexander was hospitalized in Pennsylvania. (Alexander Affidavit p. 2)

In the present case there was a communications failure between Todd Alexander and the homeowners' association much like the communications failure between the insurance company's attorney and the Master's secretary in *Poole v. Jefferson Standard Life Ins. Co.*, 174 S.C. 150, 177 S.E. 24 (1934), between Henry's attorney and the Sheriff's office in *Henry v. Blakely*, 216 S.C. 13, 56 S.E. 2d 581 (1949) , and between Clay and the auctioneer in *Spillers v. Clay*, 233 S.C. 99, 103 S.E. 759 (1958). The difference is that Todd Alexander is not an attorney, is not experienced in foreclosures, is not a resident of South Carolina and is in very fragile health.

The $135,000.00 difference between the fair market value of Todd 's house and the amount bid at the foreclosure sale and the other circumstances require that the sale be set aside.

2. THE MASTER-IN-EQUITY ERRED IN NOT VACATING THE JUDICIAL SALE BECAUSE THE SALE CONSTITUTED A FORFEITURE.

The Master mistakenly concluded that because the high bid at the foreclosure sale was $181,000.00, "The fair market value of the property was thus established at $181,000.00." (Order p. 4) A foreclosure is not a voluntary sale and does not establish the fair market value of the property. "Fair market value is the amount at which property would change hands between a willing buyer and willing seller, *Black's Law Dictionary*, 597 (6th Ed. 1990)." *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 151, 662 S.E.2d 424, 426 (Ct. App. 2008).

The involuntary sale of Todd's property for $135,000.00 less than the tax valuation of the property is a forfeiture and a harsh penalty. "The courts of South Carolina have long held that forfeitures or penalties are not favored in either law or equity." *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d at 361, 363 (2002).

"A court of equity abhors forfeitures, and will not lend its aid to enforce them.' *Jones v. N. Y. Guar. & Indem. Co.*, 101 U.S. 622, 628 (1879). 'Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice.' *Lane v. N. Y. Life Ins. Co.*, 147 S.C. 333, 374, 145 S.E. 196, 209 (1928)." *Regions Bank v. Winguard Properties, Inc.*, S.C. Ct. of Appeals opinion number 4846 (June 22, 2011).

In *Cody Discount, Inc. v. Merritt*, 368 S.C. 570, 629 S.E.2d 697 (Ct. App. 2006) Merritt entered an installment contract to purchase a mobile home and lot for $44,500.00. The contract provided that failure to comply with the terms and conditions would entitle the vendor to repossess the premises and retain all payments as rent. Cody Discount brought an action to have Merritt evicted based on her payment history. When the action began Merritt had paid all but about $1,000.00 owed on the contract. On appeal Merritt argued that the Master erred in holding that it was fair and equitable that her right in the real property should be forfeited and the Court of Appeals agreed.

> "Although it is true that Merritt has made late payments on and off since the inception of the land sale contract, it is also true that all the property owners, including Cody Discount, continued to accept the payments without declaring her in default. It was only when Merritt was within approximately $1,000.00 of paying off an original contract price of $44,500.00 that Cody Discount decided it would no longer be advantageous for them to transfer the property and thus they brought the current action."
>
> 368 S.C. at ___, 629 S.E.2d at 700

The Court of Appeals affirmed the Master's decision to relieve Merritt from forfeiture of the mobile home and reversed the Master's decision to permit forfeiture of the real property. The action was remanded for a determination of the amount Merritt owed to redeem the property.

In the present action Todd Alexander is threatened with forfeiture of $135,000.00 of equity in his house because of a $761.00 homeowners association lien. He was and is ready, willing and

able to pay the full amount owed to the homeowners association. The sale should be vacated to allow the homeowners association to accept his payment and prevent the forfeiture.

3. THE MASTER-IN-EQUITY ERRED IN NOT VACATING THE JUDICIAL SALE BECAUSE THE SALE CONSTITUTED AN UNJUST ENRICHMENT OF THE THIRD PARTY BIDDER.

In *Federal National Mortgage Association v. Brooks*, 304 S.C. 506, 405 S.E.2d 604 (Ct. App. 1991) the plaintiff, FNMA, foreclosed a second mortgage and waived the right to a deficiency judgment. On the morning of the foreclosure sale, FNMA's attorney's son fell ill and he was unable to attend the sale. The attorney called his law partner to bid on the property. Due to a miscommunication, the law partner failed to enter a bid to protect FNMA's interest in the property. A third party was the high bidder. FNMA moved to set aside the sale.

The Court of Appeals did not find the high bid to be grossly inadequate and did not reach the issue of excusable neglect because it found the inadequacy of the bid price combined with other circumstances to be a sufficient basis for setting aside the foreclosure sale. Instead the Court of Appeals concluded:

> "In our consideration of the order under appeal, we are mindful of the fact this matter is equitable in nature and FNMA's petition was addressed to the discretion of the court. *Spillers*, 233 S.C. 99, 103 S.E.2d 759. We agree with the referee it would be most inequitable under the facts of this case to allow Brooks to be unjustly enriched at the expense of FNMA. It is apparent FNMA waived deficiency judgment on the premises it would either obtain the property at the judicial sale or be paid by a third party who was willing to bid more than FNMA. We conclude no abuse of discretion has been shown and the order of the special referee should be affirmed."
>
> 304 S.C. at 512, 405 S.E.2d at 607

It would be most inequitable under the facts of the present case to allow the third party bidder to be unjustly enriched at the expense of Todd Alexander. FNMA's attorney's son was ill on sales

day resulting in FNMA not placing a bid. Todd Alexander was in the hospital on salesday. These extenuating circumstances prevented parties to foreclosures who were ready, willing and financially able to bid from protecting their interests in the sales. The third party bidder should not be unjustly enriched at Todd Alexander's expense.

4. THE MASTER-IN-EQUITY ERRED IN NOT VACATING THE JUDICIAL SALE BECAUSE THE PROPERTY HAD BEEN TIMELY REDEEMED.

The Master mistakenly concluded that, "Defendant's equity of redemption was terminated upon the knocking down of the third party's bid at the sale on June 6." (Order p. 5) The common law, the statutes and the decree in this action do not support the Master's conclusion. The equity of redemption is not terminated until the judicial sale is complete by compliance with the bid and delivery of the deed.

The Declaration of Covenants, Conditions and Restrictions for Wachesaw Plantation East provide for assessment liens and that a lien may be foreclosed in the same manner as a mortgage. In accordance with these provisions the homeowners association filed a lien and commenced this foreclosure action.

Under the common law a mortgage was a conveyance of real property, subject to defeasance upon payment of the debt by the due date.

> "Equity, however, looked to the substance of the mortgage, not its form. Even if the debt was past due, equity compelled the mortgagee to reconvey the property to the mortgagor upon payment of the principal with interest and costs. In other words, the mortgagor was given an equitable right to redeem the property in defiance of the terms of the mortgage." (internal citations omitted) *Bartles v. Livingston*, 282 S.C. 448, 455, 319 S.E.2d 707, 711 (1984).

A property owner's rights and interests pass to the purchaser at a judicial sale when the officer making the sale executes a conveyance to the purchaser. *S. C. Code* §15-39-830. "Upon the

execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court." *S. C. Code* §15-39-870.

In *Goethe v. Cleland*, 323 S.C. 50, 448 S.E.2d 574 (1994) the foreclosure decree awarded a deficiency judgment but also provided "bidding will not remain open after the date of sale, but compliance with the bid made be made immediately." The Clerk of Court advertised and sold the property in accordance with the decree. After the sale the Clerk of Court decided to return the successful bidder's funds because of the inconsistency in the decree. The property was then readvertised, with notice that the bidding would remain open, and resold. On appeal Cleland argued the first sale was valid citing *Cumbie v. Newberry*, 251 S.C. 33, 159 S.E.2d 915 (1968). The Court of Appeals disagreed stating:

> "Cumbie is easily distinguished. In the case before us, the Clerk discovered the error in the order prior to Housey's compliance with the bid and, consequently, never issued a deed to Housey. Thus the judicial sale was never completed and the proceedings were still subject to attack. See S. C. Code Ann. §15-39-870 (1976)"
> 323 S.C. at 55, 448 S.E.2d at 576

Todd Alexander exercised his equity of redemption by tending payment in full to the homeowners association's attorney before the sale was completed. When he exercised his equity of redemption, the third party bidder had not complied with his bid and the proceedings were still subject to attack. No deed had been issued conveying Todd Alexander's rights and interests in the property. In fact no deed could have been issued because the high bidder had not complied with the terms of his bid.

The foreclosure decree issued in this action is consistent with the pertinent statutes and case law. Paragraph nine of the decree provides: "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each Defendant(s) named herein and all persons whosoever claiming under him, them or it be forever barred and foreclosed of all right, title, interest, and equity of redemption in said mortgaged premises so sold, or any part thereof." The foreclosure decree recognizes that bidders do not always comply with the terms of their bids and provides that should compliance not be made within thirty (30) days after the date of sale, then the Master-in-Equity may advertise the premises for sale on some subsequent salesday, at the risk of the highest bidder, from time to time thereafter until full compliance shall be secured. The decree does not state that a high bidder receives an immediate right to the property upon the knocking down of the property on salesday. Only upon completion of the sale does the property owner lose his right, title, interest and equity of redemption in the property sold.

The sale of Todd Alexander's property was not complete and his equity of redemption was not barred upon the knocking down of the third party's bid. The property was timely redeemed before the sale was completed. Therefore the judicial sale should be vacated.

CONCLUSION

This is an action to foreclose a homeowners association lien for $761.00 in assessments and late fees. The property has a fair market value of $316,800.00. The high bid at the foreclosure sale was only $181,000.00. Todd Alexander, not withstanding his debilitating medical condition, timely exercised his right to redeem the property from the foreclosure.

The judicial sale should be set aside thereby permitting the homeowners association to accept Todd Alexander's payment in full of his debt or permitting the property to be readvertised and resold.

September 30, 2011

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