

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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DEC 09 2015

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

Haigh Porter, Special Referee

Case No. 2015-001924

The Bank of New York Mellon Trust Company, N.A.
f/k/a The Bank of New York Trust Company, N.A., as
successor-in-interest to JPMorgan Chase Bank,
National Association, as Trustee, Pooling and Servicing
Agreement Dated as of January 1, 2005 Mortgage Asset-
Backed Pass-Through Certificates, Series 2005-RP1, Respondent,

v.

Denise Forte; Associates Financial Services of South
Carolina, Inc.; South Carolina Department of Revenue, Defendants,

Of Whom Denise Forte is the Appellant.

RESPONDENT'S MEMORANDUM ADDRESSING APPEALABILITY

Gregory Spink, SC Bar No. 100995
The Hunoval Law Firm, PLLC
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Phone: (704) 334-7114
Fax: (704) 625-9158
Attorney for Respondent

Denise Forte
1206 Askins Road
Hartsville, SC 29550
Pro Se Appellant

Other Parties of Record:

Brian A. Calub, Esq.
McGuire Woods, LLP
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Charlotte, NC 28202
Attorney for Respondent

PURSUANT TO THIS HONORABLE COURT'S REQUEST DATED NOVEMBER 30, 2015, RESPONDENT HEREBY SUBMITS ITS MEMORANDUM PROCLAIMING THAT THE WRIT OF ASSISTANCE CHALLENGED ON APPEAL IN THIS MATTER IS NOT AN APPEALABLE ORDER, JUDGMENT, OR DECISION SUBJECT TO APPEAL AS PROVIDED BY RULE 201(A), SCACR; AND RESPONDENT AVERS AS FOLLOWS:

I. INTRODUCTION

Respondent filed its Summons and Complaint on July 26, 2012 in the Darlington County Court of Common Pleas, bearing civil action number 2012-CP-16-00636, seeking foreclosure of a Mortgage held by Respondent. The Honorable Haigh Porter, as Special Referee for Darlington County, issued an Order and Judgment of Foreclosure and Sale (the "Judgment") that was filed on January 6, 2015. A copy of said Judgment is attached and incorporated herein as **Exhibit A**. Said Judgment was subsequently served on Respondent by a Darlington County Deputy Sheriff by posting a copy of the same on the front door of Appellant's place of residence on May 7, 2015, and an affidavit reflecting the same was filed on May 22, 2015. A copy of said affidavit is attached and incorporated herein as **Exhibit B**.

Said Judgment ordered that the Darlington County Sheriff's Office is authorized to eject and remove any occupants, including Appellant, from the property located at 1206 Askins Road, Hartsville, SC 29550 (the "Property"), should the same not be performed voluntarily. After being unable to successfully eject and remove Appellant from said property, Respondent petitioned the lower Court for a Writ of Assistance (the "Writ") further authorizing the Darlington County Sheriff's Office to eject and remove any occupants, including Appellant, from the Property, and the Writ was filed on August 13,

2015. A copy of said Writ is attached and incorporated herein as **Exhibit C**. This Writ was served on Respondent by a Darlington County Deputy Sheriff by posting a copy of the same on the front door of Appellant's place of residence, the Property, on August 31, 2015, and an affidavit reflecting the same was filed on September 11, 2015. A copy of said affidavit is attached and incorporated herein as **Exhibit D**.

On September 9, 2015, Appellant filed a Notice of Appeal with the South Carolina Court of Appeals challenging the Writ filed on August 13, 2015. As of the date of this Memorandum, said Notice of Appeal has not been filed with the Clerk of the lower Court as required by Rule 203(d)(1)(B), SCACR.

II. ARGUMENT

The Judgment filed on January 6, 2015 is the final judgment and the Writ is not appealable. "Appeal may be taken, as provided by law, from any final judgment or appealable order." Rule 72, SCRPC. Respondent's Writ is supplementary to the Judgment to further aid the execution of the portion of Respondent's Judgment requiring Appellant to vacate the Property. "Executions may issue upon final judgments or decrees" S.C. Code § 15-39-30. Respondent's Judgment upon which the Writ was issued is the final order subject to appeal, and the Writ is not appealable. The Writ is not dispositive of any issues in the action, which have already been disposed of in the Judgment, and the Writ is interim until Appellant vacates the Property. Further, Appellant has since vacated the Property, thereby rendering the Writ and this appeal moot.

"Appeal may be taken, as provided by law, from any final judgment, appealable order or decision." Rule 201(a), SCACR. Further, "[o]nly a party aggrieved by an order,

judgment, sentence or decision may appeal.” Rule 201(b), SCACR. Therefore, if the aggrieved party is the party possessing the right to appeal, the aggrieving order must be the order challenged on appeal. Appellant has only sought to appeal the Writ, not the Judgment. The execution of Writ is an aid to the Judgment authorizing the Darlington County Sheriff’s Office to remove Appellant from the Property, forcibly if necessary. As the Judgment provides the same authority, the Writ supports the Judgment. Appellant is aggrieved by the Judgment, which has not been appealed and is therefore affirmed, not the Writ. Consequently, as the Writ is not the aggrieving order, the Writ is not appealable and this appeal should be dismissed.

Respondent’s Judgment, filed on January 6, 2015 and served on Appellant on May 7, 2015, was not appealed by Appellant. See Ex. B. “An unappealed ruling is the law of the case and requires affirmance.” *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (citing *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010)). Appellant was required to file her Notice of Appeal within thirty (30) days of receipt of the judgment, and failed to do so. Rule 203(b)(1), SCACR. Respondent’s Judgment, therefore, is final and undisturbed, and Respondent’s right to eject and remove Appellant from the Property is the law of this case.

A challenge of the Writ to this Court does not affect the unappealed Judgment, which remains enforceable and continues to afford Respondent the right to eject and remove Appellant from the Property. See Ex. A, pp. 8-9, ¶¶ 9-10. See *South Carolina Nat’l Bank v. Blossom*, 321 S.C. 110, 467 S.E.2d 767 (Ct. App. 1996) (finding that the

matters decided in an order granting foreclosure are not stayed by an appeal following a party's failure to move for an order staying execution of a judgment). There can be no value to this appeal as the outcome, whether it be reversed or affirmed, cannot affect Respondent's final Judgment. A Writ of Assistance is not required to eject Appellant from the Property. Respondent sought the Writ after the Deputy Sheriff was unable to eject Appellant from the Property through conventional, regular means with the Judgment alone. The Writ of Assistance reiterated the authority given to the Sheriff's Office in the Judgment to eject Appellant from the Property through the use of force, if necessary. Therefore, as the actual power lies in the body of the Judgment, an appeal of the Writ serves no useful purpose, and this appeal should be dismissed.

The Writ provides that the course for challenging it must begin with the filing of a Motion to Stay Writ of Ejectment. See Ex. C, p. 2. Appellant has failed to file any such motion with the lower Court, therefore, no issue in this matter is appealable. See *Brown v. Buttz*, 15 S.C. 488 (1881) (discussing discretion remaining with the trial Court for a stay of execution when the order being executed upon provides for the same). As with an interlocutory order, the Writ does not affect any decision on the merits of this case; therefore, it is not appealable. The merits in this case have long been decided, the time period to appeal said judgment has expired pursuant to Rule 203(b)(1), SCACR, and therefore the final judgment in this matter is affirmed.

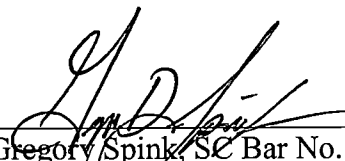
The Appellant should have filed a motion to enjoin the execution of the Writ and if that motion was denied, she could have appealed that order. Pursuant to the Writ, Appellant was to be ejected and removed from the Property after ten (10) days of service

of the same. See Ex. C, p. 2. The Writ was subsequently served on Appellant and posted on the front door of the Property on August 31, 2015. See Ex. D. As such, the Writ was confirmed on September 11, 2015 because Appellant failed to enjoin the execution of the Writ. The Writ is confirmed, final, and complete, and there is nothing for this Court to review because the Writ is not appealable. When a party fails to seek proper relief from the lower Court, there is no right to appeal. See *Great Games, Inc. v. South Carolina Dep't of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (discussing issues not being appealable if not first brought to the lower Court's attention). As such, the Writ is affirmed and this appeal should be dismissed.

III. CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Honorable Court dismiss Appellant's Appeal because a Writ of Assistance is not an appealable order, judgment, or decision pursuant to Rule 201(a), SCACR and more than thirty (30) days has expired since the final foreclosure judgment was filed and served, pursuant to Rule 203(b)(1), SCACR.

THE HUNOVAL LAW FIRM, PLLC



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ATTORNEY FOR RESPONDENT

December 8, 2015

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

DEC 09 2015

SC Court of Appeals

Haigh Porter, Special Referee

Case No. 2015-001924

The Bank of New York Mellon Trust Company, N.A.
f/k/a The Bank of New York Trust Company, N.A., as
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Agreement Dated as of January 1, 2005 Mortgage Asset-
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v.

Denise Forte; Associates Financial Services of South
Carolina, Inc.; South Carolina Department of Revenue, Defendants,

Of Whom Denise Forte is the Appellant.

PROOF OF SERVICE

I, Dustin Brasington, employee of the Hunoval Law Firm, PLLC, hereby certify
that I served a true and correct copy of the *Respondent's Memorandum Addressing
Appealability* by first-class, U.S. Mail with postage prepaid upon the following:

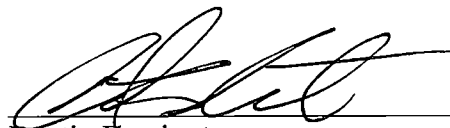
Denise Forte
1206 Askins Road
Hartsville, SC 29550
Appellant's address of record

[CONTINUED ON FOLLOWING PAGE]

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Return address used by Appellant

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Attorney for Respondent

This 9 day of December, 2015.



Dustin Brasington
Managing Litigation Paralegal

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December 9, 2015

RECEIVED

DEC 09 2015

SC Court of Appeals

VIA HAND DELIVERY ONLY:
South Carolinas Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: The Bank of New York Mellon Trust Company, N.A., et seq. v. Denise Forte, et al.
Case No.: 2015-001924
Our File No.: 005284L

Dear Sir or Madam:

Enclosed, please find the original and two copies of *Respondent's Memorandum Addressing Appealability* in the above referenced matter. By copy of this letter, I am hereby serving a copy of the referenced document on all parties of record in this matter.

Should you have any questions or concerns, please do not hesitate to contact our office.

Sincerely,



Dustin Brasington
Managing Litigation Paralegal

Enclosures (as stated)

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. THIS COMMUNICATION IS FROM A DEBT COLLECTOR.

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