THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master in Equity

Appellate Case No. 2015-001807

Winrose Homeowners Association, Inc. and Regime Solutions, LLC — Respondents,

v.

Devery A. Hale and Tina T. Hale, — Appellant.

INITIAL BRIEF OF RESPONDENT WINROSE HOMEOWNERS ASSOCIATION, INC.

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STATEMENT OF THE CASE

Respondent Winrose Homeowners' Association, Inc. ("HOA") filed suit against Appellants Tina T. Hale and Devery A. Hale ("Hales") on February 11, 2014 seeking foreclosure of an unpaid homeowners' association assessment lien. (Complaint.) The Hales were served February 14, 2014 and subsequently failed to submit any responsive pleading. (Aff. of Default.) A default damages hearing was held June 30, 2014 and the Hales did not appear. (Rec. of Hrg.) Judgment was entered in favor of HOA on July 21, 2014. (Judgment of Foreclosure and Sale.) The foreclosure sale was held August 4, 2014. (Report on Sale.). Respondent Regime Solutions, LLC ("Regime Solutions") was the winning bidder at $3,036.00. (Report on Sale.) The sale was confirmed on October 17, 2014 and a deed was issued to Regime Solutions. (Report on Sale.)

On November 4, 2014 the Hales filed a Motion to Vacate Sale on the ground the sale price was so grossly inadequate it shocked the conscience. (Mot. to Vacate.) A hearing on the Hale's motion was held on February 6, 2015. At this hearing Tina Hale submitted an affidavit admitting that she received notice of the foreclosure suit and that she "put [the papers] in a drawer and forgot about them." (Aff. of Tina Hale.) The Hales also presented evidence that the subject property is currently worth $128,000. (Def.'s Mot. to Vacate, Ex. 1.) The Hales further stated that their current mortgage balance was $66,004.00. (Aff. of Tina Hale, Ex. A.)

On April 21, 2015 the Master in Equity entered an order denying the Hales' motion. (Order of April 21, 2014.) On August 21, 2015 the Hales served the Notice of

Appeal on both Respondents. (Notice of Appeal.)

STANDARD OF REVIEW

The determination of whether to set aside a foreclosure sale is a matter within the discretion of the trial court. Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." Carson v. CSX Transp., Inc., 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012).

ARGUMENTS

I. THE TRIAL COURT CORRECTLY UPHELD THE JUDICIAL SALE BECAUSE THE PURCHASE PRICE WAS MORE THAN 53% OF THE VALUE OF THE PROPERTY

"A judicial sale should not be set aside except for cogent reasons. The purpose of the law and of the proceedings in which a sale has been decreed is that it shall be final." E. Sav. Bank, FSB v. Sanders, 373 S.C. 349, 355, 644 S.E.2d 802, 805 (Ct. App. 2007) (quoting Spillers v. Clay, 233 S.C. 99, 104, 103 S.E.2d 759, 761-62 (1958)). "[I]t is the long-established policy in South Carolina that '[t]he courts should be particularly jealous of the integrity of judicial sales.'" Ex parte Johnson, 371 S.C. 614, 618, 640 S.E.2d 887, 890 (Ct. App. 2006) (citing In re Wilson, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927)). "[A]ny conduct on the part of those actively engaged in the selling or bidding [at a judicial sale] that tends to prevent a fair, free, open sale, or stifle or suppress free competition among bidders, is contrary to public policy[.]" Id. (citing Ex parte Keller, 185 S.C. 283, 291, 194 S.E. 15, 19 (1937)).

A. Senior Encumbrances Must Be Included in the Calculation of the Purchase Price in the "Shock the Conscience" Analysis

"South Carolina has not established a bright line rule for what percentage the sale value must be with respect to the actual value in order to shock the conscience of the court. However, a search of South Carolina jurisprudence reveals only when judicial sales are for less than ten percent of a **property's actual value**, have our courts consistently held the discrepancy to shock conscience of the court." E. Sav. Bank, FSB at 359, 644 S.E.2d at 807 (emphasis added).

Where a buyer takes property at a judicial sale subject to senior liens, the court must also consider the amount of those senior encumbrances "in determining the true value of the properties to the buyer at [the judicial] sale." Arrow Bonding Co. v. Warren, 399 S.C. 603, 607, 732 S.E.2d 622, 624 (2012). The Supreme Court specifically held that Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 662 S.E.2d 424 (2008) and Investors Sav. Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780 (Ct. App. 1990) were inapplicable in considering a sale in execution of a judgment because in the former the mortgage foreclosure removes the encumbrance and in the latter case the "buyer takes the property subject to the mortgage as well as other liens." Id. The Court in Arrow Bonding unequivocally held that senior encumbrances must be part of the calculation. Id.

Nonetheless, the Hales argue that this Court should not consider any senior encumbrances in the "shock the conscience" analysis where the plaintiff in the foreclosure suit is a homeowners' association. In support of this argument the Hales cite Bloody Point Prop. Owners Ass'n, Inc. v. Ashton, 410 S.C. 62, 762 S.E.2d 729 (Ct. App. 2014). The Hales argue that Bloody Point was an HOA foreclosure, whereas the other cases analyzing the "shock the conscience" threshold were not. However, the Hales fail to specify how an HOA foreclosure is fundamentally different from any other foreclosure or judicial sale case. Instead, the Hales state that "an HOA lien is that of a second lien to the mortgage but the [Bloody Point] court did not consider senior liens in its calculation." (App. Initial Br. p. 7.) Nowhere in Bloody Point does the court state that the HOA lien

was a junior lien. While it is true that most homeowners' association liens will be junior to at least a purchase money mortgage, this is not always the case. In fact, the Master in Equity in Bloody Point considered the sales price to be $11,593.20. Order Denying Def.'s Mot. to Vacate p. 3-4, Bloody Point Prop. Owners' Assoc., Inc. v. Ashton, Case No. 2011-CP-07-2176 (Beaufort County Ct. of Common Pleas, July 25, 2012). The court reached this figure by adding the foreclosure sale bid of $8,800.00 to $2,793.20 in past due assessments and property taxes due on the property. Id. The trial court held these amounts must be included in the purchase price because they had to be paid for the foreclosure bidder to "obtain the Property free and clear of all liens." Id.

Just as the trial court reasoned in Bloody Point, a court must take senior encumbrances into consideration because the purchaser at sale must pay those senior encumbrances if it wants clear title to the property. Whether it assumes regular payments of the mortgage, pays the outstanding balance immediately, or pays the balance at a subsequent transfer of the property, in order to exercise full ownership of the property it must clear those encumbrances.

At the January 2015 hearing Regime Solutions indicated it intended to pay off the senior mortgage if the Hales' motion was denied. (Trans. p. 4, l. 17-18, Jan. 16, 2015.) Nonetheless, the Hales' urge this court not to consider the senior encumbrances because Regime Solutions is not personally liable to pay the balance owed on the senior mortgage. However, this argument confuses an obligor's personal liability under a note and a property owner's interest in real property secured by a mortgage. As the new owner of the subject property, Regime Solutions must payoff the senior encumbrances if it wants to maintain ownership of the property. Regime Solutions' lack of personal liability in no way diminishes the effect of the lien on the value of the real property in Regime Solutions' hands. The question before the court is whether the consideration given by Regime Solutions for the real property is so low that is shocks the conscience. The evidence before the trial court was that Regime Solutions took the property subject to a senior mortgage and that Regime Solutions intended to payoff that senior mortgage to clear title to the property. That consideration was clearly more than 10% of the fair market value of the property.

It is simply inequitable to require a purchaser at foreclosure sale to pay at least 10% of the fair market value of the property free and clear of any encumbrances and then also payoff the senior encumbrances with no credit for the diminution in value caused by those same encumbrances.

B. The Trial Court Correctly Calculated the Purchase Price by Adding the Outstanding Senior Encumbrances to the Foreclosure Sale Bid.

"When addressing the value paid in the context of a foreclosure sale, the winning bid should be considered cumulatively with any encumbrances to which it would be subjected." In re Cerrato, 504 B.R. 23, 35 (Bankr. E.D.N.Y. 2014) (citing In re Barr, 170 B.R. 772, 777 (Bankr. E.D.N.Y. 1994)(applying South Carolina law in holding the aggregate bid price included senior mortgages and taxes due on the property)). Our Supreme Court has clearly stated that courts must analyze what impact the senior encumbrances have on the true value of the property. Where a buyer takes property at a judicial sale subject to senior liens, the court must also consider the amount of those senior encumbrances "in determining the true value of the properties to the buyer at [the judicial] sale." Arrow Bonding Co., 399 S.C. at 607, 732 S.E.2d at 624.

The Master in Equity correctly held that the effective sales price is the bid amount plus the encumbrances against the property. This calculation is the most logical calculation where a purchaser takes title at a foreclosure sale and must expend additional sums to obtain clear title to the property. The focus is on the value of the property and what impact senior encumbrances will have on that value, not the value of the purchaser's bargain or the cost to the foreclosed property owner. Here, the outstanding mortgage of $66,000 cuts the fair market value in half. The outstanding mortgage, coupled with Regime Solutions' $3000 bid, creates an aggregate bid of $69,000. The aggregate bid is more than 53% of the fair market value of the property. Accordingly the Master in Equity correctly upheld the foreclosure sale.

C. To Base the "Shock the Conscience" Analysis on the Owners' Equity in the Property Would Impermissibly Chill Bidding at Judicial Sales

The Hales alternatively argue the court should divide the bid amount by the equity in the property to properly determine whether the successful bid "shocks the conscience" of the court. The Hales' position is problematic in that it requires any potential bidder to somehow divine the amount of equity in the property so as to formulate a bid high enough to overcome the "shock the conscience" threshold. A bidder could likely estimate the fair market value of the property based on the tax assessed amount and other public information. However, a bidder has no way of knowing the current amount of any mortgage, judgment, or other lien encumbering the property at the time of the sale. The public record would only indicate the amount of the senior mortgage, judgment, or other lien at the time that lien was filed. Because senior lienholders are not necessary parties in the underlying foreclosure suit they are often not named as parties. Accordingly, the judgment of foreclosure and sale often does not disclose the current balance of any senior encumbrances. There are a multitude of the federal privacy acts that would forbid a senior lienholder from disclosing the payoff amount to an interested bidder prior to the sale.[1] In fact, because South Carolina does not require servicers to contemporaneously record assignments of mortgages, the public record may not even disclose to any interested bidder the current mortgage holder or servicer of the loan.

The Hales argue that the HOA should be responsible for determining the equity in the property prior to sale. However, the Hales seem to admit that the HOA only has access to the public record showing the original mortgage.[2] (App. Br. p. 11.) The Hales' proposal would require the HOA to track down the current mortgage holder or servicer of any senior mortgage, convince that servicer to violate federal law by releasing

[1] See Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692c; Gramm-Leach-Bliley Act 15 U.S.C.A. § 6801 et seq.

[2] The Hales incorrectly allege that the HOA has access to the "amount of the original note." (App. Br. p. 11.) However, the note is a secured instrument and is not typically filed in any public record. Only the mortgage is filed. This is significant because the mortgage typically does not contain certain provisions like interest rate, advance clauses, or escrow provisions that a bidder would need in order to estimate the current balance due on the note and mortgage.

information about its borrowers' current balance, determine how much equity is in the property in light of that information, and then formulate a bid that exceeds the 10% threshold. This process would not only impermissibly chill the bids at every foreclosure sale of a junior lien, it is impossible in practice.

D. The Trial Court Correctly Exercised Its Discretion in Upholding the Foreclosure Sale.

The Hales argue that the Master in Equity refused to exercise his discretion by failing to consider the specific circumstances of this case, by failing to consider the Hales' equitable argument, and because he thought he was required to accept the equation outlined in Arrow Bonding. (App. Br. p. 16.) However, the Order does not support this analysis. Specifically, the Order indicates the Master in Equity considered "the motions, and arguments of the respective parties . . ." (Order p. 2.) The Hales outlined the majority of their argument in their Motion to Vacate. The February Transcript indicates the trial court heard oral arguments for over thirty minutes from all parties. (Trans. p. 1, February 6, 2015.) The Hales have presented no evidence that the Master in Equity did not consider these written and oral arguments in rendering his decision.

As discussed more fully below, the Hales' only mention of equity is asking the court to do equity where equity should be done. (Trans. p. 20, l. 1.) Furthermore, it is evident from the trial court order that the Master in Equity did consider the equities in this case. Specifically, the last paragraph of the Order indicates the Master in Equity considered the impact a contrary ruling would have on creditors holding a second lien such as the HOA in this case. (Order p. 2.)

Finally, nowhere in the Order does the Master in Equity indicate that he believes Arrow Bonding case to be controlling authority. Instead, the Master in Equity indicates that he "**declines to adopt** the calculation advanced by the Defendants and **instead adopts** the calculation of the bid amount in the fashion set forth in the South Carolina Supreme Court case Arrow Bonding Company v. Warren." (Order p. 2.) The Master in Equity clearly understood there were two possible methods of calculation before him. He affirmatively exercised his discretion by adopting the Respondents' method of calculation

over that of the Hales.

The Hales confuse the Master's choice of adopting a position contrary to the Hales' position as an abuse of discretion or lack of exercising his discretion. The Hales cannot show that the Master in Equity made an error of law or otherwise abused his discretion. Accordingly, the trial court's order should be affirmed.

II. THE PRINCIPLES OF EQUITY REQUIRE THE SALE BE UPHELD

A. Appellants' Equitable Arguments Are Not Preserved for Appellate Review because Appellants Failed to Raise the Arguments to the Trial Court

"In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Id.

The Hales argue that the trial court abused its discretion by failing to weigh equitable maxims and principles. (App. Br. p. 11.) However, the Hales never raised any equitable arguments in their Motion to Vacate. They only mention the idea of equity once in their entire argument before the trial court. (Trans. p. 19-20, l. 24-1, Feb. 6, 2015.) Specifically, the Hales merely asked the trial court to "do equity where perhaps equity should be done." (Trans. p. 20, l. 1, Feb. 6, 2015.) Now, in their appeal, the Hales seek to raise five different equitable maximums in support of their arguments. Because these arguments were not raised to the trial court and the trial court was not given the opportunity to rule them, these arguments are not properly before this court for consideration.

B. Appellants are not Entitled to Equity Because Equity Rewards the Diligent

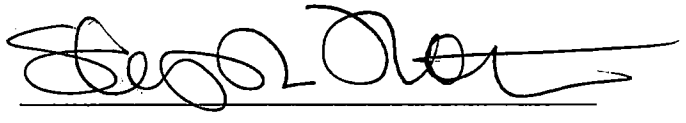
"Equity rewards the diligent, not those who sleep on their rights." In re Houston, 409 B.R. 799, 811 (D.S.C., 2009). The Hales were personally served with the Summons

and Complaint in this matter on February 14, 2014 but failed to make any response to the HOA's suit. The Hales similarly failed to appear at the final foreclosure hearing in August 2014. In fact, the Hales failed to make any appearance or attempt to pay for over 8 months. The Hales have provided no explanation for their failure to participate in the foreclosure suit other than that Tina Hale forgot about the lawsuit paperwork. (Aff. of Tina Hale.) Nonetheless, the Hales argue extensively that the trial court violated principles of equity by failing to vacate the sale. Essentially the Hales have admitted that they failed to participate in the underlying foreclosure suit or foreclosure sale but are asking the court to save them from their negligence and allow them to pay the debt now, over a year after the original sale. The principles of equity are not used to save a litigant from his own failure to protect his interests and should not be used to overturn a sale that followed all the statutory requirements.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Master in Equity.

Respectfully submitted,



December 29, 2015

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Master-in-Equity

The Honorable Joseph M. Strickland, Master-in-Equity

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v.

Devery A. Hale and Tina T. Hale, Defendants.

of which

Winrose Homeowners' Association, Inc. and Regime Solutions, LLC.....Respondent,

v.

Devery A. Hale and Tina T. Hale.....Appellants.

CERTIFICATE OF SERVICE

I, Stephanie Trotter, an employee with the Law Firm of McCabe, Trotter & Beverly, PC, attorneys for Respondent Winrose Homeowners' Association, Inc., hereby certified that I have served or caused to be served a copy of the foregoing document upon the below named individual and/or counsel this 29th day of December, 2015, via U.S. Mail, postage prepaid and addressed as follows:

DOCUMENTS SERVED

RESPONDENT WINROSE HOMEOWNERS' ASSOCIATION, INC.'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD OF APPEAL

PARTIES SERVED

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December 29, 2015

The Honorable Jenny Abbott Kitchings
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Post Office Box 11629
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Re: Winrose Homeowners' Association, Inc. v. Devery A. Hale
Appellant Case No. 2015-001807
MTB File No. 008928/00015

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Respondent Winrose Homeowners' Association, Inc.'s Initial Brief and Designation of Matter to Be Included in the Record of Appeal. Please file the original and return a clocked in copy to us in the enclosed envelope.

By copy of this letter, I am serving a copy for Respondent Winrose Homeowners' Association, Inc.'s Initial Brief and Designation of Matter to Be Included in the Record of Appeal on all parties.

With kind regards, I am

Sincerely yours,

Stephanie C. Trotter

SCT/th
Enclosures

cc: Brian L. Boger, Esquire (w/enclosure)
Eric C. Hale, Esquire (w/enclosure)

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