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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

Appellate Case No. 2014-002242

Windswept Villas III Horizontal Property Regime..... Respondent,

v.

Elaine Devlin Peery a/k/a Elaine D. Peery.....Appellant.

FINAL BRIEF OF RESPONDENT WINDSWEPT VILLAS III HORIZONTAL PROPERTY REGIME

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the master-in-equity have personal jurisdiction over Appellant and was Appellant afforded procedural due process where Appellant personally appeared, had notice of the claims, and took part in the proceedings in question?

II. Did the master-in-equity err in awarding reasonable attorneys' fees as a sanction where Appellant was in contempt of court because she repeatedly failed to appear at supplemental proceedings and to follow the court's instructions set forth in its order on supplemental proceedings and where attorneys' fees were provided for in the underlying action?

STATEMENT OF THE CASE

This appeal arises out of supplemental proceedings wherein Windswept Villas III Horizontal Property Regime (hereinafter "Windswept" or "Respondent") properly executed on a $27,034.02 judgment dated March 29, 2012.

When this appeal was most recently noticed,[1] three orders were included in Appellant's Notice of Appeal:

(1) the Master in Equity's August 29, 2014 Order on Supplemental Proceedings, wherein the "Court order[ed] the funds held in trust at Thurmond, Kirchner, Timbes be paid to Plaintiff's counsel by 5 pm today!";

(2) the August 29, 2014 Order of Contempt and Sanctions Order on Supplemental Proceedings, which found Appellant in contempt of court and subject to $20,000 in attorneys' fees and $726.39 in costs as sanctions; and

(3) the Form 4 Order from Supplemental Proceedings wherein the Master denied Appellant's Motion to Vacate because the court found that Appellant made a voluntary appearance under Rule 4 of the South Carolina Rules of Civil Procedure.

Rather than discussing the orders included in her Notice of Appeal, Appellant's

[1] This is the second appeal filed by the Appellant in this matter. After a number of deficiencies with the Appellant's initial effort to appeal this matter (see the history of Appellate Case No. 2014-001635), that appeal was ultimately dismissed as premature. **Ct. App. Order, Sept. 18, 2014.**

initial brief seems to appeal the March 29, 2012 judgment. For example, Appellant's initial brief states:

> This is an appeal from a decision of the Charleston County Master in Equity's **Order for Judgment of Foreclosure and Sale** (Deficiency Judgment Demanded against Elaine D. Peery a/k/a Elaine Devlin Peery). Appellant asks this Court to find that the Master did not have personal jurisdiction and that Appellant's right to procedural due process was denied because Respondent failed to serve Appellant with its Cross Claim. Appellant asks that the Master's order be reversed and that the award of attorneys' fees be reversed, or remanded for a determination of reasonableness and failure to provide evidentiary support of the award of attorney's [sic] fees.

App. Initial Br. 4 (emphasis added). An appeal of the March 29, 2012 judgment is neither timely nor proper pursuant to Rule 203, SCACR. ***See* Am. R. p. 166.**

Notwithstanding this significant defect (which alone provides this Court sufficient reason to dismiss the appeal and affirm the lower court's decisions), the master in equity's three orders on appeal should be affirmed based on the law, the facts, and the merits. The court had personal jurisdiction over Appellant because she voluntarily appeared in both the underlying matter (which is not on appeal) and in supplemental proceedings (which are on appeal). Appellant was afforded procedural due process because she received notice, an opportunity to be heard, and an opportunity for judicial review in both the underlying matter (which is not on appeal) and in supplemental proceedings (which are on appeal). There is extensive factual support for the master in equity's finding of contempt during these supplemental proceedings, and the master in equity did not abuse his discretion by awarding $20,000 of attorneys' fees and $726.39 in costs as sanctions.

STATEMENT OF FACTS

These supplemental proceedings stem from a never-appealed $27,034.02 judgment awarded to Respondent based on its cross-claim brought in Civil Action Number

2009-CP-10-5799. **Am. R. pp. 6-7.** Because Appellant's brief nonetheless addresses that 2012 judgment, Respondent Windswept Villas III Horizontal Property Regime ("Respondent") will address the relevant procedural history which led up to the underlying judgment in addition to the pertinent history of the supplemental proceedings preceding this appeal.

A. Relevant procedural history of underlying foreclosure matter and cross-claims by Appellant and Respondent dating back to 2009.

In September 2009, Bank of America brought this action against Appellant to foreclose on her property located in Windswept III on Kiawah Island in South Carolina. **Am. R. pp. 49-56.** Respondent, an organization comprised of all the property owners within the Windswept Villas III Horizontal Property Regime, filed its Answer and Cross-Claim as to Appellant on September 24, 2009, and alleged that Appellant was in default on her assessments. **Am. R. pp. 57-61.** In its Cross-Claim, Respondent sought to recover those assessments along with interest, service fees, and penalties from the date the assessments first became due, plus attorneys' fees, the cost of collection, and any other and further charges and assessments as had accrued since September 15, 2009, all as authorized by the Master Deed. **Am. R. pp. 57-61.**

1. Respondent's Cross-Claim was served on December 3, 2009.

Respondent attempted service on numerous occasions beginning in the fall of 2009.[2] On November 25, 2009, Barnwell Vaughan, then-counsel for Appellant, filed an Answer and Counterclaim against Bank of America and included a Cross-Claim as to

[2] On September 30, 2009, Respondent attempted service of its Cross-Claim on Appellant via certified mail return receipt requested and received no response. **Am. R. pp. 256-260, ¶ 4.** On October 28, 2009, Respondent again attempted service on Appellant and, again, such papers were returned unclaimed. **Am. R. pp. 256-260, ¶ 5.**

Respondent. **Am. R. pp. 62-66.** Based on Appellant's cross-claim, Respondent understood that Appellant had received its cross-claim, notwithstanding the fact that Appellant had successfully evaded service up until that time. **Am. R. pp. 256-260, ¶ 6.** Lydia Davidson, counsel for Respondent accepted service of Appellant's Cross-Claim on November 30, 2009. **Am. R. pp. 256-260, ¶ 7.** On December 2, 2009, Davidson emailed Vaughan to let him know Respondent received neither its registered mail nor the green card from its attempted service of Respondent Windswept's Cross-Claim on Appellant. **Am. R. pp. 256-260, ¶ 8.** On December 3, 2009, Vaughan was served with Respondent Windswept's Summons, Answer and Cross-Claim. **Am. R. pp. 256-260, ¶ 9.**[3]

2. Appellant's additional notice of Respondent's Cross-Claim.

When Windswept responded to Peery's cross-claim against it, its prayer for relief was almost identical to the prayer for relief from its cross-claim against Peery.[4] **Am. R. p. 59; Am. R. p. 68.**

In the summer of 2011, Appellant's attorney moved to be relieved as her counsel **(Am. R. pp. 72-73)**, and – in furtherance of its cross- claim – Respondent moved to exclude Appellant from using the common areas and recreational facilities of Windswept Villas III and to have a receiver appointed **(Am. R. pp. 74-109)**.

Windswept's motion provided Peery with additional notice of its cross-claim. For example, Paragraph 1 of Respondent's Motion to Appoint a Receiver stated:

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[3] Davidson also filed an affidavit on March 29, 2012 which stated that "the Answer and Crossclaim of Windswept III were duly served upon Defendant Elaine Devlin Peery a/k/a Elaine D. Peery (hereinafter "Peery") and Peery appeared, by and through her attorney, and filed a Counterclaim against Windswept III in this matter." **Am. R. pp. 245-250, ¶ 2.**

[4] In its prayer for relief, Windswept requested that the Court dismiss Peery's Cross-Claim and grant it judgment on the past-due assessment amount together with accrued interest, service fees, penalties, attorneys' fees, collection costs, and other relief deemed proper by the Court. **Am. R. p. 68.**

> The Association filed a Cross-Claim against Defendant Peery on September 23, 2009, to recover Peery's accrued unpaid assessments owed to the Association. In its Cross-Claim, the Association showed that it possesses the rights, powers, and duties set forth in the Master Deed of Windswept Villas III Horizontal Property Regime as recorded in the Charleston County RMC Office in Book A128, Page 186, as may have been amended from time to time ("Master Deed").

Am. R. p. 76, ¶ 1; Am. R. p. 258, ¶ 12; *see* Am. R. pp. 241-244 (setting forth with specificity Peery's default in payments of her Windswept assessments). Respondent's Notice of Motion and Motion to Appoint a Receiver was served on Vaughan as attorney for Peery by mail on July 15, 2011. **Am. R. p. 258, ¶ 12.**

In addition, Peery, through her attorney, was served with notice of the motion hearing.[5]

3. Appellant's actual notice of Respondent's Cross-Claim.

On August 1, 2011, the hearing on Vaughan's motion to be relieved as counsel[6] and Windswept's motion to appoint a receiver took place before the Honorable Mikell R. Scarborough. **Am. R. pp. 256-260, ¶13; 2d Am. R. pp. 150-172.** Appellant Peery personally attended that hearing, and the court heard her position on both motions. **Am. R. pp. 256-260; 2d Am. R. pp. 152, 155-171.** On the record, it was acknowledged that the purpose of Windswept's motion was to obtain rent proceeds from the property in order to pay Windswept and/or Bank of America. **2d Am. R. p. 164.** Peery did not raise

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[5] Notice of the Motion hearing for both of these Motions was served on Vaughan, counsel for Peery, and Davidson, counsel for Windswept, by Plaintiff, Bank of America, on July 27, 2011. **Am. R. pp. 110-112.**

[6] When the Court heard Vaughan's request to be relieved as counsel, Windswept objected because almost $45,000 in back assessments were owed on the Peery unit, and Windswept was concerned that having a new attorney appointed would further delay the already protracted proceedings. **Am. R. pp. 256-260; 2d Am. R. p. 153.** When the Court granted Vaughan's motion to be relieved as counsel, Peery requested that she be provided with all case filings, and Judge Scarborough stipulated that Vaughan should provide Peery with whatever was in the file. The court noted "[t]here were some motions, some answers, I think some Cross-Claims. But he's [Peery's attorney has] been active in the case but the case is not moving along quickly." **2d Am. R. pp. 169-170; Am. R. pp. 256-260.** The Court granted Peery 60 days to retain new counsel or else proceed pro se. **2d Am. R. pp. 169-170; Am. R. pp. 256-260.**

jurisdictional objections at the hearing, understood the purpose of the proceedings, and requested that she be allowed in the unit to collect some personal belongings. **2d Am. R. pp. 164-171; Am. R. pp. 256-260, ¶ 16.** The court granted Windswept's motion based on its cross-claim. **Am. R. p. 170.**

4. Appellant was served with notice of subsequent hearings leading up to the judgment on Respondent's Cross-Claim.

The foreclosure hearing scheduled for January 24, 2012, was properly noticed by Bank of America on December 1, 2011. **Am. R. pp. 123-126; Am. R. p. 259, ¶ 20.** The bank's certificate of service filed with the court on December 2, 2011 reflects that Ms. Peery was served with notice of such hearing.[7] **Am. R. pp. 123-126; Am. R. p. 259, ¶ 20.**

In addition to Peery having been served with notice of the hearing, Windswept's counsel, Davidson, spoke to Barry Holden, Peery's attorney, on January 23, 2012. **Am. R. p. 259, ¶ 21.** As set forth in Davidson's affidavit, Holden knew about the hearing and indicated that Peery did, as well. **Am. R. p. 259, ¶ 21.** In her affidavit, Davidson stated her understanding that Peery requested a continuance of that hearing, and that Peery's request was denied, as evidenced by a Form 4 Order issued by the Honorable Mikell R. Scarborough on January 24, 2012. **Am. R. p. 5;**[8] **Am. R. p. 259, ¶ 22.**

At the January 24, 2012 hearing, the court held that the judgment on Windswept's claims would be entered upon a hearing on the receivership funds, which was set for March 2012. **2d Am. R. pp. 192-194; Am. R. pp. 259-260, ¶ 23.** Bank of America's

[7] This court filing directly contradicts Appellant's representation that "No proof of service of notice of the foreclosure hearing was filed with the Court." **Appellant's Initial Br. 7.**
[8] This order was never appealed.

attorney sent notice of the same to Peery on March 14, 2012. **Am. R. pp. 127-130; Am. R. p. 259, ¶ 23.**

The hearing on receivership funds took place as noticed on March 27, 2012, and order of judgment in favor of Windswept was issued accordingly. **Am. R. pp. 6-7; Am. R. p. 259, ¶ 24.**

5. Appellant was served with Notice of Entry of the Judgment on Respondent's Cross-Claim. ***See* Am. R. p. 259, ¶ 25; Am. R. pp. 220-223.**

Following entry of the court's orders, the clerk's office mailed notice of the entry of judgment "to all counsel of record and/or parties entitled to receive notice" via first class mail. **Am. R. pp. 220-223 (stating that the applicable orders [Order Discharging Receiver, Order of Judgment, and Order for Final Distribution of Funds] were mailed first class on April 3, 2012 to all counsel of record and all parties entitled to receive notice); Am. R. pp. 259-260, ¶ 25**. Notice of the entry of each of these orders was automatically sent by the Clerk of Court to Peery's address on file with the court at the time of entry. **Am. R. pp. 220-223**.

Appellant did not file post-trial motions, and no appeal followed those proceedings. The Notice of Appeal in the present appeal did not include any of the orders from the underlying foreclosure matter. **Am. R. p. 166.**

B. Supplemental Proceedings to Collect on Respondent's Judgment against Appellant based on Respondent's Cross-Claim in the Foreclosure proceedings.

The judgment enforcement matter was referred to the master in equity for Charleston County on October 31, 2013 for supplemental proceedings. **Am. R. pp. 8-14.** The Order of Reference directed Peery to personally appear; to produce certain documents in advance of the January 13, 2014 hearing; to appear for a deposition; and

to answer questions under oath or else be subject to a contempt order. **Am. R. pp. 8-14.**

Windswept made repeated efforts to serve Appellant with notice of the motion and the hearing on supplemental proceedings.[9] Appellant was aware of the Supplemental Proceedings because she retained counsel, John Cantrell, for those proceedings, and her counsel voluntarily appeared on her behalf in those proceedings (notwithstanding the fact that the Order expressly "directed" Peery "to appear"). **Am. R. pp. 8-16.**

On December 31, 2013, Cantrell contacted counsel for Windswept via email to communicate that he was "recently retained to represent Elaine D. Peery" in the "Windswept Villas v. Elaine Peery supplemental proceedings." **Am. R. pp 261-263.** In that email, Cantrell communicated his awareness of the January 13, 2014 hearing set before Judge Scarborough. **Am. R. pp 261-263.** Cantrell further stated awareness of the January 6, 2014 discovery deadline set forth in the Court's Order of Reference dated October 28, 2013. **Am. R. pp 261-263.** His email further communicated, "It is my understanding based on recently reading the supplemental proceedings order in this case that there is an order for my client to appear before the Master on January 13, 2014, and to produce documents to you on January 6, 2014." **Am. R. pp 261-263.** Based on this communication, along with other telephone communications with Cantrell, counsel for Windswept understood that Peery was aware of the supplemental proceedings that

[9] In an effort to comply with Rule 4.2 of the South Carolina Rules of Professional Conduct and out of an abundance of caution, Windswept served a copy of this Motion on Jesse Kirchner, Esquire, who was actively representing Peery in an ongoing construction matter, and Barnwell Vaughan, Esquire, who previously represented Peery in the foreclosure matter which gave rise to these supplemental proceedings. **Am. R. pp. 261-263.** When Windswept's current counsel learned that neither of these attorneys represented Peery in the supplemental proceedings, Windswept attempted twelve times via a process server to personally serve Peery at her home address, which was the address on file with the court and her last known address otherwise. (R. pp. 261-263) In addition, the notice of hearing was sent via certified mail return receipt requested, restricted delivery to that address, but Windswept received no response. **Am. R. pp. 261-263.**

Windswept as judgment creditor instituted to collect on its March 29, 2012 judgment. **Am. R. pp 261-263.**

Cantrell appeared at the initial January 13, 2014 hearing and filed his notice of appearance that day. **Am. R. pp 261-263; Am. R. p. 138; Am. R. pp. 180-186.** At the hearing, Cantrell sought a continuance, and it was confirmed that the total underlying judgment amount, ($27,034.02) had been identified as being held in trust for Peery at the law firm of Thurmond, Kirchner, Timbes & Yelverton, PA. **Am. R. pp. 180-186; Am. R. pp. 15-16.** The court granted Cantrell's request for a continuance and ordered that the $27,034.02 held in trust must remain there subject to the Court's jurisdiction and until such further notice and Order of the Court. **Am. R. pp. 15-16.**

On February 14, 2014, Windswept's counsel emailed Cantrell to communicate the need to proceed with discovery to identify funds to pay the attorneys' fees, collection costs, and interest on the judgment. **Am. R. pp. 276-277.** The correspondence asked Cantrell to provide Windswept with dates for Peery's deposition and to provide Windswept with the materials outlined in the October 31, 2013 Order. **Am. R. pp. 276-277.** Counsel for Windswept again contacted Cantrell on March 3, 2014 and again requested deposition dates the discovery due pursuant to the October 31, 2013 Order. **Am. R. pp. 276-277.** Having not received a deposition date or the required discovery, Windswept scheduled a continued hearing on supplemental proceedings to request a court order that Peery and her counsel timely cooperate with discovery for the identification of assets which may be used to satisfy in full the amounts owed per the underlying judgment. **Am. R. pp. 276-277.** Counsel for Windswept never obtained the discovery or the deposition availability. ***See* Am. R. pp. 276-277; Am. R. pp. 30-31.**

The continued hearing on supplemental proceedings was scheduled for April 21, 2014, and once again Peery's attorneys were served notice[10] of that hearing on March 27, 2014. On April 14, 2014, Peery filed a "Motion to Vacate Rule 60(b)(1), Rule 60(b)(2), Rule 60(b)(3) Relief from Judgment or Order." **Am. R. pp. 139-142.**[11] This motion was not served on counsel for Windswept at that time and was instead handed to Windswept's counsel moments before the April 21, 2014 hearing on supplemental proceedings.[12] Peery failed to appear at that hearing, which had been set because Peery would not respond to discovery or submit to a deposition. **2d Am. R. pp. 210:4-211:14.**

Because Appellant still had not complied with the court's October 31, 2013 order, Respondent filed a motion for a rule to show cause. **Am. R. pp. 146-159.** That hearing was scheduled, noticed, and took place on June 20, 2014. **Am. R. p. 160; 2d Am. R. pp. 228-264.** At that hearing, the Court took up several matters, which included execution on

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[10] Affixed to the hearing notice were the Court's Order of Reference, which included (1) the underlying 2012 judgment order; (2) the October 31, 2013 Order which required Peery respond to discovery and give testimony; and (3) the January 15, 2014 order of continuance and order that Peery's funds shall remain in trust pending further proceedings.

[11] The grounds were of "mistake, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation and misconduct" in that Peery (1) "never had actual notice of the hearing for Entry of Judgment nor actual notice of the Order of Judgment filed March 29, 2012"; (2) "a Motion hearing was held by the Plaintiff again without actual notice to the Defendant ultimately granting Plaintiff's Petition for Supplemental Proceedings"; (3) "entry of the Order of Reference granting Plaintiff's Petition for Supplemental Proceedings is not relevant to the Plaintiff's efforts to collect the monies held in trust in the amount of $27, 034.02"; (4) "Plaintiffs have failed to provide any proof or evidence to this Court that would suggest that the Defendant is judgment proof that would warrant a fishing expedition into the Defendants' assets, in the event the judgment stands" and "Plaintiffs effort to move forward with the Supplemental Proceedings is nothing short of a witch hunt to achieve the collection of post judgment relief that is near parallel to the judgment amount of $27, 034.02." **Am. R. pp. 139-142.**

[12] This was in contravention of Rule 5(d), SCRCP. In response, Windswept filed its Memorandum in Opposition to Judgment Debtor's Untimely Motion to Vacate on May 6, 2014 based on the plain language of Rule 60(b)(1), (2), and (3) which states that such a motion shall be made within a reasonable time, and for reasons (1), (2), and (3) **not more than one year after the judgment, order, or proceeding was entered or taken.**" **Am. R. pp. 206-225.** In addition, Windswept provided affidavits of Davidson and Monoc demonstrating the facts, none of which supported the relief requested by the Peery, albeit untimely. **Am. R. pp. 210-219.** Windswept further provided the Court-issued Notice of Entry of Judgment, which demonstrates that the Order Discharging Receiver, Order of Judgment, and Order of Final Distribution of Funds in the underlying matter was mailed first class on April 3, 2012 to all counsel of record and all parties entitled to receive notice, which includes the Appellant. **Am. R. pp. 220-223.**

the judgment arising out of Windswept's Cross-Claim, Respondent's Motion for a Rule to Show Cause; Attorney Cantrell's Motion to be Relieved as Counsel,[13] and Respondent's "Motion to Vacate Rule 60(b)(1), Rule 60(b)(2), Rule 60(b)(3) Relief from Judgment or Order." **Am. R. pp. 143-145; 2d Am. R. pp. 228-264.**

The court denied Cantrell's Motion to be Relieved as counsel. **Am. R. pp. 22-23; 2d Am. R. p. 237.**[14]

The court denied Appellant's Motions to Vacate pursuant to Rule 60(b)(4)[15] as well as Rule 60(b)(1)(2) and (3), stating that the "Court finds Defendant made a voluntary appearance under Rule 4, SCRCP." **Am. R. pp. 32; 2d Am. R. pp. 261:19- 262:10.** During the June 20, 2014 hearing, Judge Scarborough elaborated:

> I can't buy that she didn't get notice when she, in fact, asked for a continuance. By definition this Court finds notice. Your question has to do with jurisdiction and service of process. That's what y'all are after. And I find that on multiple occasions she made voluntary appearances in this court. And under Rule 4 this is sufficient to confer jurisdiction on this court. Your motion is denied.

2d Am. R. pp. 260-261.

In its Order on Supplemental Proceedings, the court ordered that the base judgment amount owed by Appellant pursuant to Respondent's judgment (i.e., the

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[13] On May 6, 2014, Respondent's attorney Cantrell moved to be relieved as counsel because "he has been unable to reach the defendant by normal means of communication for the past several weeks and is therefore unable to properly represent the defendant regarding the pending matter." **Am. R. pp. 18-21.** Respondent objected to the motion because of the undue burden and delay his withdrawal would pose in the matter, which was set for final hearing on June 20, 2014. **2d Am. R. pp. 233:4-6.**

[14] The court denied Cantrell's motion and held that, "Under the circumstances of these protracted supplemental proceedings, which have been protracted because of Peery and her counsel's failure to timely comply with the October 28, 2013 Court Order, and because the Court has questions as to whether Cantrell communicated the Court-Ordered discovery and his intention to withdraw to his client, I find that Cantrell's Motion to now be relieved as counsel at this final stage of the proceedings is not in the interest of justice." **Am. R. pp. 22-23.** Notwithstanding the Court's Order, Cantrell submitted a "Consent Order Allowing Withdrawal of Attorney" on July 25, 2014, executed by The Honorable Stephanie P. McDonald, and filed on July 30, 2014. **Am. R. p. 28.**

[15] Windswept objected to this purported motion but continues to maintain a motion per 60(b)(4) was not properly before the court. ***See* Am. R. pp. 226-239.**

$27,034.02, which was being held in trust at a local law firm) be paid immediately or as soon as practicable and that Windswept was entitled to all attorneys' fees, costs, and interest claimed in the matter, which were deemed reasonable pursuant to the court's *in camera* review. **Am. R. pp. 18-21; 2d Am. R. pp. 243-250.**

As to Respondent's Motion for a Rule to Show Cause, the court recognized its inherent power to punish for contempt and held that:

> . . . The record demonstrates that Peery failed to comply with the Court-ordered discovery and failed to personally appear at Supplemental Proceedings to answer questions under oath as ordered by the Court. Nor did she or her counsel cooperate with Windswept's counsel to submit to a deposition. Peery and her counsel specifically failed to do what the law required to be done – namely, to participate in discovery and Supplemental Proceedings. I find that Peery has been on notice of these proceedings and the applicable discovery requests set forth in the Court's October 31, 2013 Order since late 2013 yet has failed to comply with the same and has failed to appear at a single hearing. For these reasons I find that Peery is in contempt of Court and subject to sanctions; specifically, Peery's contempt provides an additional ground for the Judgment Creditor to recover reasonable attorneys' fees and costs (previously awarded in this Court's Order on Supplemental Proceedings on other grounds).
>
> **An additional hearing on the matter shall be set for August 29, 2014 at 10 a.m. The Judgment Creditor is to personally serve the Judgment Debtor, Elaine Peery, with notice of the August 29, 2014 hearing wherein Peery must show cause as to why she failed to appear at these Supplemental Proceedings and respond to discovery as required by the Court's October 31, 2013 Order. Should Elaine Peery fail to appear at the August 29, 2014 10 a.m. hearing, she will be subject to arrest and imprisonment.** The Court will at that time also rule on additional attorneys' fees costs that may be owed by Peery.

Am. R. pp. 24-27; 2d Am. R. pp. 248:25-250:6 (double emphasis in original). Appellant was personally served with this Order on July 9, 2014. **Am. R. p. 278.**

At the August 29, 2014 hearing, Appellant personally appeared and was asked to show cause why she failed to appear at these Supplemental Proceedings and respond to discovery as required by the Court's October 31, 2013 Order. **Am. R. pp. 30-31.** No

such cause was shown and the Court held that Appellant was in contempt of court and subject to sanctions. **Am. R. pp. 30-31.** The court found that Appellant "must pay $20,000.00 in attorneys' fees and $726.39 in costs" along with $5,072.23, the applicable post-judgment interest, within thirty days of the hearing. **Am. R. pp. 30-31.** Appellant paid those amounts, and this appeal followed.

STANDARD OF REVIEW

"A motion to vacate . . . is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. An abuse of discretion arises when the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *McCall v. IKON*, 363 S.C. 646, 651, 611 S.E.2d 315, 317 (Ct. App. 2005).

"A determination of contempt is a serious matter and should be imposed sparingly; whether it is or is not imposed is within the discretion of the trial judge, which will not be disturbed on appeal unless it is without evidentiary support." *Miller v. Miller*, 375 S.C. 443, 452, 652 S.E.2d 754, 759 (Ct. App. 2007). The lower court is entrusted to award sanctions, and the lower court's determination of the issue will not be disturbed on appeal absent an abuse of discretion. *QZO, Inc. v. Moyer*, 358 S.C. 246, 255-56, 594 S.E.2d 541, 546-47 (Ct. App. 2004) "An abuse of discretion may be found where Appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Id.*

I. The master-in-equity had personal jurisdiction over Appellant because Appellant personally appeared, had notice of the claims, and took part in the proceedings in question. In addition, Appellant received notice, an opportunity to be heard,

and an opportunity for judicial review.

The master in equity did not abuse his discretion[16] when properly refusing to vacate its March 29, 2012 judgment pursuant to Appellant's Motions under Rule 60(b)(1), (2), (3), and (4) because Appellant voluntarily appeared **(Am. R. pp. 256-260; 2d Am. R. pp. 152, 155-171)** in addition to her attorney having been served with Respondent's cross-claim and subsequent motions pursuant to its cross-claim **(Am. R. pp. 67-69; Am. R. pp. 74-109; Am. R. pp. 241-244; Am. R. pp. 245, ¶ 2; Am. R. pp. 256-260; Am. R. pp. 110-112).**

In addition, the master in equity had personal jurisdiction over Appellant because she personally appeared in the supplemental proceedings which led up to the Orders included in Appellant's notice of appeal. **Am. R. pp. 276-277; Am. R. p. 138; Am. R. pp. 180-186; Am. R. p. 278; 2d Am. R. pp. 200-206; 2d Am. R. p. 281:12.**

A. The master in equity properly denied Appellant's motion to vacate.

The master in equity did not abuse his discretion when he denied Appellant's motion to vacate Respondent's 2012 judgment against her because Appellant personally and voluntarily appeared in that action. Rule 4 provides that "[v]oluntary appearance by defendant is equivalent to personal service . . ." Rule 4, SCRCP. Where, as here, a defendant appears in court, it is a voluntary appearance. *Stephens v. Ringling*, 102 S.C.

[16] To the extent Appellant argues that the court did not have personal jurisdiction over her when issuing its 2012 judgment on Respondent's cross-claim, that judgment is not properly on appeal. *See* Rule 203, SCACR (requiring that the notice of appeal be filed within 30 days after receipt of written entry of an order or judgment and that the notice contain, among other things, (a) the date of the order or judgment from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken; and (b) all attorneys of record to the underlying judgment be included in the notice; and requiring that a copy of the order(s) and judgment(s) being challenged on appeal be submitted with the notice of appeal).

333, 342, 86 S.E. 683, 685 (S.C. 1915) ("The act of appearance is defined to be 'a coming into court. . . .").

> "The term 'appearance' is used particularly to signify or designate the overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction." 'An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction.' No specific act constitutes an appearance, as "a defendant may choose to come into court with trumpets, or quietly by the back door.' Accordingly, courts decide on a case by case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction."

Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007) (internal citations omitted) (holding correspondence from one attorney to another demonstrated an intent to submit to the court's jurisdiction and amounted to a voluntary appearance where the letter announced representation without reservation, expressed intent to reach the merits of the case, and did not communicate desire to challenge service of process).

Moreover, the equivalent of personal service is achieved where, as here, a defendant has voluntarily appeared *before* a judgment. *See State ex rel. McCall v. Cohen*, 13 S.C. 198, 202 (1880). The record demonstrates that:

- Peery's former attorney Vaughan initially appeared in this matter on her behalf and that Peery personally appeared in this matter. **Am. R. pp. 256-260; 2d Am. R. pp. 152, 155-171.**

- Appellant's then-counsel and Respondent's then-counsel communicated about the case, which included Respondent's cross-claim. **Am. R. pp. 256-260.**

- Appellant's attorney was served with Windswept's Summons, Answer, and Cross-Claim. **Am. R. pp. 256-260.**

- Peery personally attended the August 1, 2011 hearing wherein a receiver was appointed on Windswept's motion to recover monies owed to the judgment creditor in accordance with and pursuant to its cross-claim. **Am.**

R. pp. 256-260; 2d Am. R. pp.152, 155-171.

- Peery was sent notice of the final hearings on the foreclosure matter as well as that judgment. **Am. R. pp. 123-130; Am. R. pp. 220-223; Am. R. pp. 235-239; *See* 2d Am. R. pp.152, 155-171.**

Even if her appeal of the judgment were timely and proper, which it is not, Appellant cannot now seek to set aside a valid judgment under these circumstances. The master in equity's order on Appellant's Motion to Vacate should be affirmed.

B. The master in equity had personal jurisdiction over supplemental proceedings because Appellant voluntarily appeared and because her attorney accepted service on her behalf.

The master in equity had personal jurisdiction over Appellant in the supplemental proceedings which led up to the Orders included in Appellant's notice of appeal. *See, supra,* discussion of Rule 4, SCRCP.

Peery made a voluntary appearance in supplemental proceedings. Specifically:

- Appellant's attorney communicated with Respondent's attorney about supplemental proceedings prior to the first hearing. **Am. R. pp. 261-263.**

- Appellant's attorney appeared on her behalf at the initial hearing on Supplemental Proceedings. **Am. R. pp. 180-186.**

- He filed a notice of appearance after actually appearing before Judge Scarborough on these supplemental proceedings. **Am. R. p. 138; Am. R. pp. 180-186.**

- Appellant personally appeared at the August 29, 2014 hearing on contempt and sanctions on August 29, 2014. **2d Am. R. p. 281:12.**

Accordingly, there was personal jurisdiction of the hearings giving rise to the orders on supplemental proceedings noticed in this appeal, namely (1) the Master in Equity's August 29, 2014 Order on Supplemental Proceedings ordering that the funds identified to pay the underlying judgment be released to Respondent; (2) the August 29, 2014 Order of Contempt and Sanctions Order on Supplemental Proceedings, which found Appellant

in contempt of court and subject to sanctions for failure to show cause why she failed to appear at these Supplemental Proceedings and respond to discovery as required by the court's October 31, 2013 Order. The above-described orders on supplemental proceedings should accordingly be affirmed.

C. Appellant was afforded procedural due process in the supplemental proceedings which led up to the orders on appeal.

Appellant does not dispute that she was afforded procedural due process during supplemental proceedings. ***See* App. Initial Br. 4, 13** (stating on page 4 that her "right to procedural due process was denied because Respondent failed to serve Appellant with its Cross Claim"). To the extent Appellant attempts to appeal the 2012 judgment[17] and argue that she did not have notice of the underlying foreclosure hearing, such arguments are not supported by the law or the facts.

Rule 5(b)(1) of the South Carolina Rules of Civil Procedure states:

> "....Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address.....Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint."

In accordance with Rule 5(b)(1) of the South Carolina Rules of Civil Procedure, Appellant was served with the Notice of Final Foreclosure Hearing scheduled on January 24, 2012 by Charles S. Gwynne, Jr., attorney for Bank of America, N.A., via United States Mail on December 1, 2011. **Am. R. pp. 123-126; Am. R. pp. 235-236.** Service on Peery was made by mailing the Notice of Final Foreclosure Hearing to the address as shown in the records of the Charleston County Clerk of Court as follows: Elaine Devlin Peery, 3053 Pignatelli Crescent, Mount Pleasant, SC 29466-8057. **Am. R. pp. 123-126; Am. R. pp.**

[17] As stated, *supra*, this is improper pursuant to Rule 203, SCACR.

235-2394. In addition, Peery was mailed notice of the hearing on receivership funds. **2d Am. R. pp. 118-119.**

Communications with Barry Holden, attorney for Appellant (who, upon information and belief, had not appeared in the foreclosure matter), were in addition to the notices and correspondence served upon Appellant, who was *pro se* at that point. Such communications with Holden were not intended to constitute service upon Peery but they were evidence of notice and Appellant's awareness of the proceedings. Service was complete upon mailing of the hearing notice to Peery's home and last known address which was the correct address on file with the Court.

All that is required under procedural due process is "notice, an opportunity to be heard in a meaningful way, and judicial review." *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009) (citations omitted). The record fully supports that Appellant received notice, an opportunity to be heard, and an opportunity for judicial review. Specifically:

- Peery received notice of the cross-claim. **Am. R. pp. 256-260; Am. R. p. 245; Am. R. pp. 67-69 (requesting the same relief requested in the Cross-Claim);**
- Peery received notice of Windswept's Motion to Appoint a Receiver and to Exclude Peery from Use of the Common Areas and Recreational Facilities of Windswept Villas III. **Am. R. pp. 110-112; 2d Am. R. pp. 77-112, 332-341;**
- Peery personally appeared at the August 1, 2011 hearing which led to a receiver being appointed for Windswept so that it could recover on its cross-claim against her. **Am. R. pp. 256-260; 2d Am. R. pp. 152, 155-171;**
- Peery received notice of the hearing which led up to her judgment. **Am. R. pp. 123-130;** and
- Peery received notice of the judgment against her. **Am. R. pp. 123-130; Am. R. pp. 220-223.**

***See also* 2d Am. R. pp. 247:20-261:5.**

D. Also, Appellant's Motion to Vacate pursuant to Rule 60(b)(1), (2), and (3) was untimely based on the plain language of that rule.

Appellant's motion to Vacate pursuant to Rule 60(b)(1), (2), and (3) was filed April 16, 2014, more than two years after the date of judgment which Appellant had notice of. The plain language of Rule 60(b)(1), (2), and (3), expressly relied upon by Appellant in her filed motion, states that such "motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Rule 60(b), SCRCP (emphasis added). "The movant in a rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief. . . [the Court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) (citations omitted). "A presumption of proper service exists when the rules governing service are followed." *Id.* (citations omitted). In this case, the underlying Order was entered on March 29, 2012 – more than two years prior to Appellant's "Motion to Vacate Rule 60(b)(1), Rule 60(b)(2), Rule 60(b)(3) Relief from Judgment or Order" filed April 16, 2014.

II. The master in equity did not abuse his discretion when awarding Windswept reasonable attorneys' fees as a sanction after finding that Appellant was in contempt of court and where the record supports such a finding of contempt. In addition, Appellant cannot now appeal the court's purported failure to set forth its *Blumberg* factors analysis because the issue was not preserved for appeal.

There is abundant factual support for the master in equity's finding of contempt during these supplemental proceedings. Contemptuous behavior is conduct that tends to bring the authority and administration of the law into disrespect. *Stone v. Reddix-*

Smalls, 295 S.C. 514, 516, 369 S.E.2d 840, 840-841 (1988). "A determination of contempt ordinarily resides in the sound discretion of the trial judge." *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 607, 567 S.E.2d 514, 519 (Ct. App. 2002). "'Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory. Compensatory contempt seeks to reimburse the party for the costs it incurs in forcing the non-complying party to obey the court's orders.'" *Floyd v. Floyd*, 365 S.C. 56, 80-81, 615 S.E.2d 465, 478 (Ct. App. 2005) (*quoting Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 178-179, 557 S.E.2d 708, 711-712 (Ct. App. 2001)).

In this case, the court found Appellant "in contempt of court and subject to sanctions, specifically her contempt provides an additional ground for the judgment creditor to recover reasonable attorneys' fees and costs." Because Appellant was in contempt, the master in equity had the discretion to award $20,000 worth of attorneys' fees and $726.39 in costs as sanctions. Based on the ample support for his finding that Peery did not appear in court for the supplemental proceedings to answer questions under oath and never responded to discovery and refused to submit to a deposition request **(Am. R. pp. 261-263; Am. R. pp. 276-277; Am. R. pp. 24-27; 2d Am. R. pp. 248:25-250:6; Am. R. pp. 30-31)**, the master in equity did not abuse his discretion.

Appellant's claim that the master in equity erred by not reciting the *Blumberg* factors in its award of attorneys' fees fares no better.[18] To be clear, the award of attorneys' fees came in the form of a sanction. **Am. R. pp. 30-31** ("I find that . . . Judgment

[18] Under *Blumberg* there are six factors to consider in determining an award of attorneys' fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993); *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961). Attorneys' fees are not recoverable unless authorized by contract or statute. *Id.*

Debtor is in contempt of court and subject to sanctions. For sanctions, I find that the . . . Judgment Debtor must pay $20,000 in attorneys' fees and $729.39 in costs."). Appellant cites no authority, nor has Respondent found authority, which requires a factor-by-factor *Blumberg* analysis when awarding attorneys' fees pursuant to its contempt power.[19]

Moreover, Appellant's *Blumberg* argument was not properly preserved for appeal. To preserve an issue for appellate review, the issue must have been raised and ruled upon by the trial court; raised by Appellant; raised in a timely manner; and raised to the trial court with sufficient specificity. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). Appellant's *Blumberg* arguments set forth in her initial brief were not raised by Appellant and were not ruled upon by the lower court. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." *Wilder Corp.*, 330 S.C.at 76, 497 S.E.2d at 733 (internal citation omitted).

Notwithstanding all of this, the Respondent's attorneys' fees[20] affidavit comports with the *Blumberg* factors, and the court found those fees to be reasonable. The court determined, based on a review of the affidavit and an *in camera* review of the bills, that

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[19] Appellant appears to rely on *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) to support this proposition, but *Glasscock* is not a contempt case.

[20] In this case, reasonable attorneys' fees and collection costs were awarded in the underlying action because paragraph 5.07 of the Bylaws of Windswept Villas III Horizontal Property Regime addresses "Collection" and provides that "[i]f any overdue assessment is collected by an attorney or by action at law, the co-owner owing the same shall be required to pay all reasonable costs of collection, including attorney's fees." Because reasonable attorneys' fees and costs were permitted and awarded in the underlying action, they were also properly awarded on supplemental proceedings. *See Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 326 S.C. 460, 483 S.E.2d 796 (Ct. App. 1997), rev'd on other grounds, 334 S.C. 324, 513 S.E.2d 617 (1999) (holding that a party who was entitled to recover attorneys' fees in an underlying action is also entitled to recover attorneys' fees incurred in a supplemental proceeding).

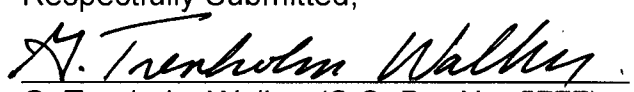
$20,000 of the $27,662.00 claimed (for more than a year's worth of work) was reasonable.[21] Again, and notwithstanding, this issue was not raised before the lower court and was not preserved for appeal.

CONCLUSION

The master in equity did not abuse his discretion when he correctly determined the court had personal jurisdiction over Appellant, who voluntarily appeared in the underlying matter and in supplemental proceedings. In addition, there is evidence that Appellant was served with the cross-claim and that she was served with notice of all applicable hearings. The record reflects that Appellant had both notice and an opportunity to be heard and an opportunity for judicial review. Finally, the award of attorneys' fees as a sanction for Appellant's contempt during supplemental proceedings was proper.

For all of these reasons, each order on appeal should be AFFIRMED.

Respectfully Submitted,



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[21] Appellant's contention that the undersigned counsel has billed $1000 per hour is not supported by the affidavits submitted by the undersigned and included in the Appellant's designation of matter. The undersigned counsel's hourly rate as set forth in the affidavit is $200 per hour. **Am. R. pp. 264-267; Am. R. pp. 279-280.**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

Appellate Case No. 2014-002242

Windswept Villas III Horizontal Property Regime..... Respondent,

v.

Elaine Devlin Peery a/k/a Elaine D. Peery.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent Windswept Villas Horizontal Property Regime, enclosed herewith, complies with Rule 211(b), SCACR.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
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v.

Elaine Devlin Peery a/k/a Elaine D. Peery.....Appellant.

PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent Windswept Villas Horizontal Property Regime** on Appellant by depositing a copy of it in the United States Mail, postage prepaid, on January 11, 2016, addressed to his attorney of record for Appellant, Vernee C. Hancock, Post Office Box 2276, Summerville, SC 29484.

Respectfully Submitted,

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