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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2013-CP-26-2861
Appellate Case No. 2014-002047

Phyllis Hufton,
..... Respondent,

v.

Flagstar Bank, FSB and John Doe,
..... Defendants

of whom

Flagstar Bank FSB is
..... Appellant

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN DETERMINING THAT HUFTON'S "INDIVIDUAL" INTEREST SURVIVED FORECLOSURE WHEN HUFTON WAS NAMED AND SERVED IN AN INDIVIDUAL AND REPRESENTATIVE CAPACITY, FILED AN ANSWER ADMITTING THE ALLEGATIONS OF THE FORECLOSURE COMPLAINT, AND FAILED TO RAISE ANY ISSUE ABOUT THE CAPACITY IN WHICH SHE WAS SUED?

2. DID THE TRIAL COURT ERR WHEN IT FAILED TO CONSIDER THAT JUDGE STROMAN'S JUDGMENT OF FORECLOSURE AND SALE WAS THE LAW OF THE CASE AND WAS BINDING AS TO HUFTON'S INTEREST?

3. DID THE TRIAL COURT ERR BY FAILING TO CONSIDER THAT THE QUIT CLAIM DEED TO HUFTON FROM THE ESTATE OF ELMER J. CRAFT WAS PER SE DEFECTIVE UNDER VIRGINIA LAW?

4. DID THE TRIAL COURT ERR BY FAILING TO CONCLUDE THAT THE MASTER'S DEED RENDERS THE FORECLOSURE PROCEEDINGS RES JUDICATA?

5. DID THE TRIAL COURT ERR IN FAILING TO GRANT FLAGSTAR'S MOTION FOR SUMMARY JUDGMENT?

STATEMENT OF THE CASE

Respondent Phyllis Hufton ("Hufton") commenced this case on April 29, 2013 by filing a *Lis Pendens* and Summons and Complaint seeking a declaratory judgment that she is the fee simple owner of certain real property located at 1321 South Ocean Boulevard, Unit 506, North Myrtle Beach (the "Property"). (R. p. 22). Hufton further alleged that the earlier foreclosure of a mortgage owned by Appellant Flagstar Bank, FSB ("Flagstar") had no effect on her individual interest in the property because she was allegedly not named individually in the foreclosure action Id. On June 24, 2013, Flagstar filed a motion to dismiss for lack of subject matter jurisdiction based on the master's reservation of jurisdiction, or to stay the matter and refer it to the master. (R. p. 43). This motion was denied by Form 4 order on August 15, 2013. (R. p. 15). Flagstar thereafter filed an answer and counterclaim asserting that Hufton's interest was foreclosed and that even if it was not, then Hufton's sole remedy is to redeem Flagstar's interest by paying the full amount of Flagstar's debt.

On April 7, 2014, Flagstar filed a motion for summary judgment with supporting exhibits. (R. p. 77). On April 14, 2014, Hufton filed a motion to amend the complaint to add a cause of action to partition the Property. (R. p. 151). On May 12, 2014, Hufton filed a motion for partial summary judgment asserting that, as a matter of law, her interest in the Property survived foreclosure. (R. p. 156).

On June 4, 2014, Judge Larry B. Hyman denied Flagstar's motion for summary judgment by Form 4 order, and granted Hufton's motion to amend to add a claim for partition. (R. p. 17). On June 13, 2014, Hufton filed an amended complaint adding the

partition claim. (R. p. 218). Flagstar filed an answer and counterclaims to the amended complaint on June 18, 2014. (R. p. 222).

Judge Steven H. John granted Hufton's motion for partial summary judgment by order dated July 14, 2014. (R. p. 19). On August 4, 2014, Flagstar timely filed a motion to alter or amend Judge John's order granting partial summary judgment. (R. p. 306). Flagstar's motion to alter or amend was denied by Form 4 order on September 19, 2014. (R. p. 21). Flagstar timely served its Notice of Appeal on September 23, 2014. This appeal follows.

FACTS

On or about April 7, 2008, James W. Hufton, Sr. and Elmer J. Craft purchased a condominium located at 1321 South Ocean Boulevard, Unit 506, North Myrtle Beach, South Carolina (the "Property"). (R. p. 92). The Indenture Deed received by Mr. Hufton and Mr. Craft conveyed to each man an undivided one-half interest in the Property. Id. To finance the purchase, Mr. Hufton borrowed $417,000.00 and executed a note (the "Note") in favor of Golden Gate Mortgage Inc. (R. p. 98). Mr. Craft did not sign the Note, but to correctly secure the Note and recognizing that both men had received by Deed an undivided one-half interest, both Mr. Hufton and Mr. Craft executed a purchase money mortgage concerning the Property. (R. p. 102). The Note and Mortgage were subsequently assigned to Flagstar.

James W. Hufton, Sr. died on August 22, 2010. His estate was administered in Roanoke County, Virginia and exemplified copies are filed in Horry County Probate File No. 2011-ES-26-1577. James Hufton's will devised his ½ interest in the Property to his wife, Respondent Phyllis Hufton. Elmer Judson Craft, Jr. had died earlier on June 5, 2009. Craft's estate was also administered in Roanoke County, Virginia and exemplified copies are filed in Horry County Probate File No. 2011-ES-26-1576.

On September 9, 2011, Deborah A. Oehlschlaeger, as Administrator *c t a* of the Estate of Elmer Judson Craft, Jr., purported[1] to convey Craft's ½ interest in the property to Hufton by Quit Claim deed. (R. p. 113). That Quit Claim deed specifically referenced a Settlement Agreement to convey the property between James Hufton (prior to his death)

[1] Under Virginia statutory law the deed was defective as it failed to record the County and State of execution Virginia Code § 47 1-16

and the Craft estate including the consideration that Hufton would be responsible for the Flagstar mortgage debt. Id.

Neither Mr. Craft's nor Mr. Hufton's estates made the required payments or satisfied the Note before conveying their respective interests to Hufton. Following those conveyances, Hufton did not make any payments on the Note. As a result, the mortgage loan account went into default.

Flagstar filed a foreclosure action on February 20, 2012 in the Court of Common Pleas for Horry County, South Carolina (the "foreclosure action"). FSB v. Phyllis C. Hufton, as Personal Representative and Legal Heir of the Estate of James W. Hufton, Sr., Deceased, et al., (including the Estate of Elmer Judson Craft, Jr, his Personal Representative and all Heirs of the Craft Estate), Civil Action Number 2012-CP-26-1379. (R. p. 118). The complaint stated that Flagstar sought to foreclose on the entire Property. It also named every person, including Hufton, who was a legal heir or representative of Mr. Hufton and Mr. Craft's estates, including their personal representatives and heirs. Id.

On February 23, 2012, Hufton's attorney sent Flagstar's foreclosure counsel an e-mail which stated:

> I represent Phyllis Hufton, and the rest of the known parties named as defendants. I had already agreed to accept service on behalf of my client(s).
>
> Please forward a copy of the complaint filed in this matter as soon as you can. Once you have done so, I will email confirmation that such receipt by me 'constitutes personal service on Phyllis Hufton as well as any other parties you have not already effected personal service upon in this matter. I will be representing all of the parties in the suit.

(R. p. 126).

Later that day, Hufton's attorney confirmed that "*I'll accept service for Phyllis Hufton Please do not attempt to serve her personally.*" (R. p. 125) (emphasis added). Nonetheless, Hufton was personally served with a copy of the Summons and Complaint in the foreclosure action as were all of the heirs to and the personal representative of the Craft Estate. (R. p. 33). Hufton's counsel also signed and returned an Acknowledgment of Service dated February 24, 2012 as "*Attorney for Phyllis C Hufton*" without limitation or qualification. (R. p. 32) (emphasis added).

Hufton then filed an answer captioned "Answer of Phyllis C. Hufton" (again without limitation or qualification) admitting all the allegations of the foreclosure complaint. (R. p. 34). In her answer, Hufton did not contest Flagstar's right to foreclose, the superiority of its lien nor did she allege any deficiency in her capacity as a party defendant. Id.

A hearing was held before the Honorable Ralph Stroman, Special Referee for Horry County on the uncontested docket. Neither Hufton nor her counsel appeared at the hearing. As a result of the hearing Judge Stroman issued a Judgment of Foreclosure and Sale (Deficiency waived). (R. p. 1). Judge Stroman specifically found, in Paragraphs 4 and 16 of the "Conclusions of Law" section:

> (4) Defendant Phyllis C. Hufton has *not* established any claims for relief against the Plaintiff, and therefore, *no relief* should be granted to the Defendant;
>
> ...
>
> (16) And it is further ORDERED, ADJUDGED AND DECREED that Defendant[s] named herein and *all persons whosoever claiming* under him, them, or it, be foreclosure barred and foreclosure of all right, title and interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

(R. p. 9 and 12) (emphasis added). Hufton did not appeal the judgment in the foreclosure action.

Flagstar purchased the Property at a judicial sale on October 1, 2012. Following the judicial sale, Judge Cynthia Graham Howe issued a Master's Deed to Flagstar on December 3, 2012, which was recorded on December 17, 2012. (R. p. 149). That Master's Deed refers to James W. Hufton, Sr. and Elmer J. Craft, Jr as "Defendants." Id. The Master's Deed also specifically conveyed any estate, right, title, dower, possession, benefit, claim or demand whatsoever of all parties to the said suit **AND** all other persons who might rightfully claim the same or any part thereof, by, from or under either of the Defendants. Id. (emphasis added).

Six months after the foreclosure sale, and after the property had been deeded to Flagstar, Hufton commenced this action seeking a declaration that she owned the property free and clear of Flagstar's mortgage.

ARGUMENT

I. THE TRIAL COURT ERRED IN DETERMINING THAT HUFTON'S "INDIVIDUAL" INTEREST SURVIVED FORECLOSURE WHEN HUFTON WAS NAMED AND SERVED IN AN INDIVIDUAL AND REPRESENTATIVE CAPACITY, FILED AN ANSWER ADMITTING THE ALLEGATIONS OF THE FORECLOSURE COMPLAINT, AND FAILED TO RAISE ANY ISSUE ABOUT THE CAPACITY IN WHICH SHE WAS SUED?

A. Hufton was named and served in the foreclosure action.

Paragraph 2 of the trial court's order states "that Phyllis Hufton, individually, was not served in the Foreclosure Action, as required by Rule 4, SCRCP." (R. p. 19). This is not factually or legally accurate. The evidence reflects that on February 23, 2012 David Traywick, Esq. wrote via email, "I'll accept service for Phyllis Hufton" (R. p. 125) and that Mr. Traywick subsequently executed an Acknowledgment of Service as "Attorney for the Defendant Phyllis C. Hufton." (R. p. 32). Mr. Traywick did not limit or qualify the capacity in which service was being accepted on behalf of Hufton in either of these documents.

Additionally, a copy of the Summons and Complaint was personally served on Hufton as shown by the Affidavit of Service on file with the court. (R. p. 33). It is therefore error to conclude that Hufton was not served "individually" in compliance with Rule 4 SCRCP. White Oak Manor Inc. v. Lexington Ins. Co., 407 S.C. 1, 753 S.E.2d 537 (2014) (exacting compliance regarding service is not required; the court has personal jurisdiction if the defendant has notice of the proceedings). Moreover, a presumption of proper service exists when the rules governing service are followed. BB&T v. Taylor, 369 S.C. 548, 633 S.E.2d 501, 503 (2006).

It appears that Hufton and the trial court incorrectly concluded that Hufton should have been served separately because of the purported "deeded interest" from the Craft Estate, although all of the heirs and the personal representative of the Craft Estate were also named as parties, as Hufton admitted in her Answer. If so, this is error and should be reversed. Service of process under Rule 4 is made upon persons, not interests. To hold otherwise, would require that people be served multiple times in each case for every interest they may hold in a given piece of property.

There are only two capacities in which a party may be named in a suit: individual and representative. In this case, Hufton was named, served and answered in both capacities. Paragraph 15(a) of the Complaint alleges, "The Defendant, Phyllis C. Hufton, as Personal Representative **and** Legal Heir of the Estate of James W. Hufton, Sr. ... **and** by virtue of any interest claimed under the law of succession (S.C. Code § 62-2-109) or under decedent's will." (R. p. 27) (emphasis added). Thus, Hufton was named in a representative capacity as Personal Representative for the Estate of James W. Hufton **and** in her individual capacity as legal heir who may take under the decedent's will. She had no other interest in the property.

The other legal heirs to Mr. Hufton's Estate as well as the Personal Representative and heirs for the Estate of Elmer Judson Craft, Jr. were also named and served in the very same manner and capacities. (R. p. 27, ¶ 15). Surely the Court would agree the legal heirs of both the Estates of Hufton and Craft were all named and served as parties individually to the foreclosure action. Hufton, as legal heir and a party who had an interest by virtue of decedent's will, had proper personal service, due process notice, and was a party in all her various capacities.

B. Hufton was a party to the foreclosure action and the court had personal jurisdiction over her.

A court ordinarily obtains personal jurisdiction by the service of a summons. Ex parte S. Carolina Dep't of Revenue, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing State v. Sanders, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920)). Hufton was *personally* served with the Summons and Complaint. (R. p. 33). Even if that was not sufficient to include her as a party and confer personal jurisdiction over her, her attorney also executed an Acknowledgment of Service as "Attorney for the Defendant Phyllis C. Hufton," thereby remedying any alleged deficiency in service upon Hufton. (R. p. 32).

Additionally, Hufton then made a general appearance by her counsel who **filed and served an answer** captioned, "Answer of Defendant Phyllis C. Hufton" in which she admitted all the allegations of the foreclosure complaint. (R. p. 34). By making a general appearance, providing absolute admissions of all allegations and the relief sought in the foreclosure complaint, and by not contesting personal jurisdiction, Hufton waived any objections to service of process or to personal jurisdiction. See Rule 12(h)(1) SCRCP ("Waiver or Preservation of Certain Defenses"). Ex Parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (Ct.App.2009) (voluntary appearance waives personal jurisdiction issue).

The trial court thus erred by finding that Hufton was not a party to the foreclosure action and that Judge Stroman lacked personal jurisdiction over her.

C. The trial court failed to consider and apply applicable rules of civil procedure to its construction of the pleadings

Rule 10(a) SCRCP merely requires the Summons and Complaint include the names of all the parties. Significantly, and consistent with Rule 9(a) SCRCP, Rule 10(a) SCRCP

does not require the pleader to state names and each capacity of all the parties. In this case, Phyllis Hufton was *named* in the Summons and Complaint. Moreover, Rule 9(a) SCRCP provides, "It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity." More specifically, any deficiency of capacity must have been raised by Hufton, or it is waived. Chet Adams Co. v. James F Pederson Co., 307 S.C. 33, 413 S.E.2d 827 (1992). Had an issue existed, Hufton waived it with her general appearance.

Rule 8(e)(1) provides in part, "No technical forms of pleading or motions are required" and Rule 8(f) provides, "All pleadings shall be so construed as to do substantial justice to all parties." In this case, the trial court erred by holding that Flagstar had to be hyper technical in its pleadings. As a result, the trial court did not "do substantial justice" to Flagstar in its construction of the pleadings.

Consider that Hufton admitted all allegations of the Complaint, including the superiority of Flagstar's lien, that the property should be sold, and that her equity of redemption should be barred. (R. p. 34). The court should also consider that the debt owed to Flagstar is more than $416,000 dollars and that Hufton is now claiming the right to half of the Property free and clear of Flagstar's lien, despite failing to make any payments on the Note. Given these facts, the trial court's construction of the pleadings is an injustice to Flagstar. Since the foreclosure action was one in equity, the appellate court can find the facts, as determined by that action, in accordance with its own view of the evidence. A Fast Photo Exp. Inc. v. First National Bank of Chicago, 369 S.C. 80, 630 S.E.2d 285 (Ct.App. 2006). Flagstar submits that the **fact** of whether Hufton was served in all of her various capacities is a **fact** the appellate court can make independently of the trial court.

Moreover, Hufton has not been prejudiced. She was served with the foreclosure complaint, represented by counsel, filed an answer, and had a full and fair opportunity to participate in the foreclosure process. Hufton chose not to attend the foreclosure hearing, or the sale, and chose not to appeal the judgment of foreclosure. This Court should not allow Hufton a second chance to litigate ownership of the Property when she failed to avail herself of her earlier opportunity to do so.

D. This court does not permit a Defendant to play "name" (or "capacity") games.

In Tri-County Ice and Fuel Co. v. Palmetto Ice Co., a judgment debtor sought to set aside a default judgment alleging that it had been sued in the wrong name. 303 S.C. 237, 399 S.E.2d 779 (1990). The court concluded,

> Helmly, who is the principal shareholder and president of P& H Company Inc., was served with the summons and complaint and all other notices. Helmly clearly knew that Tri-County intended to sue the corporation, P& H Company, Inc., but that Tri-County was under a misapprehension as to the identity of Palmetto Ice Company. ...Yet, Helmly did not come forward to correct the misnomer, but chose to ignore it and rely on it to attack the validity of the judgment. As we stated in Waldrop, "where a defendant sued by a wrong name omits to plead in abatement and suffers the plaintiff to proceed to judgment, though he has never appeared to the wrong name, this Court will not interfere to set aside the proceedings.

Id. (quoting Waldrop v. Leonard, 22 S.C. 118 (1885) (holding that an individual who was incorrectly named in complaint could not avoid default judgment because he failed to inform the court of the error before judgment was entered)). Hufton is trying to play the same name game here, and her efforts should be similarly rejected.

E. The trial court did not consider Hufton's general admission Answer and that Hufton failed to raise the issue of capacity pursuant to Rule 9(a) SCRCP.

Hufton filed and served an answer captioned, "Answer of Defendant Phyllis C. Hufton" in which she admitted all the allegations of the foreclosure complaint. (R. p. 34). Moreover, Hufton's answer specifically provides that "Any allegation of the Complaint not specifically denied is admitted." Id. Thus Hufton admits, among other things, that her interest is junior and subordinate to Flagstar, that Flagstar's mortgage be declared a first lien, that the property be sold, and "the equity of redemption as to all defendants be barred and the lien or interest claimed by any defendant be extinguished " Id.

Moreover, if Hufton had an argument about the capacity in which she was sued, under Rule 9(a) it should have been included in her answer. Rule 9(a) SCRCP provides, "When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he *shall do so by specific negative averment*, which shall include such supporting particulars as are within the pleaders' knowledge." (emphasis added.) It is undisputed that Hufton had full knowledge about all the facts she is now raising in this action at the time she filed an answer to the foreclosure action.

This Court should reverse the trial court's order for partial summary judgment and hold that Hufton's interest was foreclosed.

II. THE TRIAL COURT FAILED TO APPLY JUDGE STROMAN'S FORECLOSURE ORDER, SPECIFICALLY ITS CONCLUSIONS OF LAW THAT HUFTON INDIVIDUALLY WAS NOT ENTITLED TO RELIEF AND THAT ALL OTHER PERSONS CLAIMING THROUGH THE PARTIES TO THE SUIT WERE ALSO FORECLOSED AND BARRED, AS THE LAW OF THE CASE.

A party may not seek relief from a prior unappealed order because the order has become the law of the case. Under the law of the case doctrine, a party is precluded from relitigating matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. Hudson v. Lancaster Convalescent Ctr., 393 S.C. 1, 7, 709 S E.2d 65, 68 (Ct.App.2011) (stating a circuit court ruling that is appealed but subsequently withdrawn is the law of the case); see also Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (holding an unappealed ruling, right or wrong, is the law of the case).

In this case, Hufton was a party and did not appeal Judge Stroman's Order and Judgment of Foreclosure and Sale; therefore it is the law of the case and should have been applied by the trial court in considering Hufton's attempt to relitigate the matter. Being the law of the case, the court was required to accept the "Conclusions of Law" by Judge Stroman. Judge Stroman specifically found, in Paragraphs 4 and 16 of the "Conclusions of Law" section:

> (4) Defendant Phyllis C. Hufton has *not* established any claims for relief against the Plaintiff, and therefore, *no relief* should be granted to the Defendant;
>
> ...
>
> (16) And it is further ORDERED, ADJUDGED AND DECREED that Defendant[s] named herein and *all persons whosoever claiming* under him, them, or it, be foreclosure barred and foreclosure of all right, title and interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

(R. p. 9; 12) (emphasis added.)

As all heirs and personal representatives of the both the Estates of Hufton and Craft were individually named, these Conclusions of Law by Judge Stroman are correct.

III. THE QUIT CLAIM DEED TO HUFTON FROM THE ESTATE OF ELMER J. CRAFT WAS *PER SE* DEFECTIVE UNDER VIRGINIA LAW.

The Quit Claim Deed to Hufton from the Estate of Elmer J. Craft was per se defective, since Virginia Code § 47.1-16 requires that every notarization act include both the state and the county or city where the act was performed. In this case the purported acknowledgement of the Quit Claim Deed from Deborah A. Oehlschlaeger, as Personal Representative of The Estate of Elmer Judson Craft, Jr. to Phyllis C. Hufton includes neither the state nor the county where the acknowledgment took place. (R. p. 113). Therefore, the deed is per se defective and insufficient to pass any title or interest to Hufton.

Moreover, any interest by Hufton from the Estate of Elmer J. Craft, through whom Hufton purportedly claims individual ownership of the property in question, was properly addressed in the foreclosure action, Case No. 2012-CP-26-1379. That is because Flagstar named Deborah A. Oehlschlaeger, as Personal Representative of The Estate of Elmer Judson Craft, Jr. (Hufton's purported Grantor), and all heirs of the Craft Estate, as a party-defendant. (R. p. 1). Any rights Hufton might claim to the property in her individual capacity are a derivative claim solely arising from the Estate of Elmer J. Craft. See Paragraph 18(d) of the "Finding of Facts" in Judge Stroman's Order of Judgment of Foreclosure and Sale filed August 27, 2012. (R. p. 8). This fact was also expressly admitted in Paragraph 15 of the "Answer of Defendant Phyllis C. Hufton" filed and served on Flagstar's Counsel. (R. p. 35, ¶ 15).

IV. THE MASTER'S DEED RENDERS THE FORECLOSURE PROCEEDINGS RES JUDICATA.

By Master's Deed dated December 3, 2012 and recorded on December 17, 2012 in Deed Book 3625 at Page 2508, the Honorable Cynthia Graham Howe conveyed all right, title and interest in the property to Flagstar Bank, FSB. (R. p. 149). The deed specifically conveyed:

> Any estate, right, title, interest, dower, possession, benefit, claim, or demand therein whatsoever of *all parties to the said suit and of all other persons who might rightfully claim the same or any part thereof, by, from, or under them, or either of them*

(Id.) (emphasis added).

Further, S.C. Code Ann. § 15-39-870 (2005) provides.

> 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.

In this case, Flagstar purchased the property at the foreclosure sale for the amount of two hundred fifty thousand ($250,000.00) dollars. (R. p. 149). At the time of its purchase, Flagstar had no notice that Hufton, who had earlier offered a deed in lieu and then filed a general admission answer admitting all the allegations of the foreclosure complaint as to both the Hufton and Craft Estates, would raise an issue that she somehow was not a party to the case and was not bound by the foreclosure judgment. Hufton's claims were not raised until several months *after* the foreclosure deed was issued to Flagstar.

This case is also analogous to Robinson v. Estate of Harris in which the court granted summary judgment based on § 15-39-870 against heirs with potential claims to

property who brought a quiet title action claiming they were not properly served in the earlier foreclosure action. 378 S.C. 140, 662 S.E.2d 420 (Ct.App.2008) aff'd, 390 S.C. 272, 701 S.E.2d 740 (2010). This Court in Robinson affirmed the trial court's ruling by finding that § 15-39-870 was controlling and binding as to all parties who "potentially" had claims. In the case at hand, all heirs and personal representatives of both the Hufton and Craft Estates were made parties and duly served. Hufton appeared and filed an Answer admitting all allegations and the mortgage foreclosure relief sought, Flagstar successfully bid and fully paid its $ 250,000.00 as consideration at the judicial sale, and Judge Howe duly executed her Master's Deed conveying the property to Flagstar. See also Cumbie v. Newberry, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968) (stating "a sound public policy requires the validity of judicial sales be upheld, if in reason and justice it can be done").

V. THE TRIAL COURT ERRED IN FAILING TO GRANT FLAGSTAR'S MOTION FOR SUMMARY JUDGMENT BECAUSE FLAGSTAR COULD RE-FORECLOSE HUFTON'S INTEREST.

Flagstar moved for summary judgment on April 7, 2014, arguing two issues: (1) the prior foreclosure action foreclosed Hufton's interest in the property and[2]; (2) Flagstar retained a right to re-foreclose on the property. (R. p. 77). Judge Larry Hyman denied the motion by form order. (R. p. 17). Judge Hyman's order should be reversed; as a matter of law, Flagstar can proceed to foreclose Hufton's interest in the property (if any).

When a lender omits an interested party from a foreclosure action, the omitted party's interest is still subject to the lender's mortgage lien. Green Tree Serv., LLC v. Adams, 375 S.C. 583, 587, 654 S.E.2d 100, 102 (Ct.App.2007) (holding that bank could

[2] Issue One of Flagstar's Motion for Summary Judgment is argued in prior sections of this brief

file a quiet title action after purchasing property at foreclosure sale to extinguish the lien of a junior lien holder that was omitted from foreclosure action). As such, courts have uniformly held that the omitted party's interest may be foreclosed upon either by re-opening the underlying foreclosure action or by commencing a new foreclosure action:

> Generally speaking... if a mortgagee forecloses but fails to join the holder of an interest in the premises as a party defendant, such interest is not foreclosed but the mortgage remains alive and the mortgagee may effectively foreclose against the omitted parties, either in the same or a new action.

First Nat'l Bank & Trust Co. v. Stark, 249 P.2d 117, 118 (Okla. 1952) (holding that, where a mortgagor was omitted from the foreclosure, the note and mortgage remain, and the situation is the same as if no legal proceeding had occurred at all); *see also* Bankers Life Assur. Co. v. Dunas, 77 N.E.2d 54, 56 (Ill. Ct. App. 1947) (finding that, where holder of note secured by trust deed named the children and devisees of a deceased purchaser of realty subject to lien of deed of trust, but did not name them in their capacity as trustees under the deed, the subsequent holder of the note had the right to foreclose upon the children as trustees); Sur. Bldg. & Loan Ass'n v. Risack, 179 A. 680, 681 (N.J. Ch. 1935) (finding that a mortgagor that foreclosed on a one-half interest in a property and purchased the property at the sale was entitled to require the owner of the other one-half interest to redeem or be foreclosed of his equity of redemption); English v. Bankers Trust Co. of Cal., N.A., 895 So. 2d 1120, 1121-22 (Fla. Dist. Ct. App. 2005) (concluding that a mortgagee can be subsequently foreclosed upon when the mortgagee was not joined in the first foreclosure); Oakland Props. Corp. v. Hogan, 117 So. 850, 851 (Fla. 1928) ("We think the law is well settled that where the owner of the equity of redemption has been omitted from

the list of parties defendant in a cause, that the mortgagee may maintain a second action to foreclose his mortgage, thereby cutting off the interest of such owner.").

It is undisputed that any interest Hufton may have received from either of the original owners was encumbered by the existing note and mortgage when she obtained her interest. If she has an interest that survived foreclosure, that interest is still encumbered.

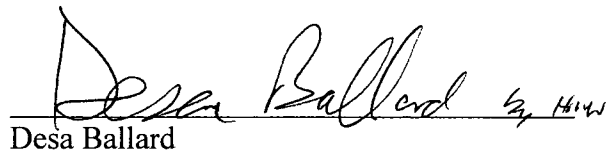
CONCLUSION

Based on the foregoing, this Court should reverse the order of the trial court granting Hufton partial summary judgment and grant judgment to Flagstar on the basis that Hufton's interest did not survive foreclosure and she no longer owns any interest in the property. In the alternative, this Court should reverse the order denying Flagstar's Motion for Summary Judgment and remand the matter for entry of an order granting judgment in favor of Flagstar.

For these reasons and to recognize the Special Referee's Order of Foreclosure and Sale, the Master's Deed heretofore recorded, and to uphold the sound and well established public policy of ensuring judicial sales being upheld, this Court should reverse the trial court's granting of partial summary judgment to Hufton and grant summary judgment to Flagstar that confirms Hufton's interests were foreclosed.

[Signature on following page]

Respectfully submitted,



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April 13, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2013-CP-26-2861
Appellate Case No. 2014-002047

Phyllis Hufton,
..... Respondent,

v.

Flagstar Bank, FSB and John Doe,
..... Defendants

of whom

Flagstar Bank FSB is
..... Appellant

CERTIFICATE OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on April 13, 2015, I served a copy of the **Final Brief of Appellant** in the above-captioned case on the following individuals by standard US Mail:

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April 13, 2015
West Columbia, South Carolina