

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

S. Jackson Kimball, Special Circuit Court

Case No. 2007 – CP – 46 -04305

RECEIVED
MAY 06 2016
SC Court of Appeals

SunTrust Mortgage, Inc.,.....Respondent,

v.

Mark Ostendorff,.....Appellant.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN ALLOWING THE HEARING TO COMMENCE WHEN OSTENDORFF HAD NOT BEEN NOTIFIED?
2. DID THE COURT ERR IN ALLOWING THE HEARING WHEN THE OPPOSING ATTORNEY USED AN ADDRESS THAT WAS NOT OF RECORD FOR SERVICE ?
3. DID THE COURT ERR IN ALLOWING THE HEARING TO COMMENCE WHEN THE OPPOSING ATTORNEY USED AN UNDELIVERABLE ADDRESS FOR SERVICE?
4. DID THE COURT ERR IN ALLOWING THE PROPERTY TO BE SOLD WHEN IT DID NOT ADVERTISE THE PROPERTY?
5. DID THE COURT ERR IN PUTTING UP FOR SALE THE PROPERTY WHEN THER WERE TWO APPEAL BEING PERFECTED?
6. DID THE COURT ERR IN PUTTING UP THE PROPERTY FOR SALE WHEN THE OPPOSING PARTY DID NOT POST BOND PENDING THE OUTCOME OF THE TWO APPEALS?
7. DID THE COURT ERR IN PUTTING OSTENDORFF'S PROPERTY UP FOR SALE BY DENYING OSTENDORFF DUE PROCESS?
8. DID THE COURT ERR IN PUTTING OSTENDORFF'S PROPERTY UP FOR SALE WHILE NOT COPENSATING OSTENDORFF?
9. DID THE COURTR ERR IN PUTTING UP OSTENDORFF'S PROPERTY FOR SALE WHILE DENYING HIM EQUAL PROTECTION OF THE LAW?
10. DID THE COURT ERR IN PUTTING OSTENDORFF'S PROPERTY UP FOR SALE WHEN THERE WERE NO WITTNESSES AT THE HEARING?
11. DID THE COURT ERR IN PUTTING OSTENDORFF'S PROPERTY UP FOR SALE WHEN THE COMPULSORY COUNTERCLAIM COULD HAVE SHOWN OSTENDORFF OWED PLAINTIFF ANY AMOUNT?
12. DID THE COURT ERR IN DENYING OSTENDORFF DUE PROCESS WHEN THE PLAINTIFF DID NOT HAVE TO PROVIDE DISCOVERY?

13. DID THE COURT ERR IN DENYING OSTENDORFF EQUAL PROTECTION OF THE LAW WHEN THE PLAINTIFF DID NOT HAVE TO PROVIDE DISCOVERY:?
14. DID TRHE COURT ERR IN NOT TAKING OSTENDORFF'S POSITION IN QUESTIONING WITNESSES SINCE POSTENDORFF WAS NOT NOTIFIED OF THE HEARING?
15. DID THE COURT ERR IN PUTTINGF UP OSTENDORFF'S PROPERTY FORE SALE WHEN THE PLAINTIFF REFUSED TO PROVIDE DISCOVERY?
16. DID THE COURT ERR IN ALLOWING THE HEARING TO COMMENCE WHEN THERE WAS AN EXISTING CONTERCLAIM APPEAL STILL BEING PERFECTED?
17. DID THE COURT ERR IN DENYING OSTENDORFF DUE PROCESS WHEN HE WAS NOT PRESENT AT THE HEARING?
18. DID THE COURT ERR IN PUTTING OSTENDORFF'S PROPERTY UP FOR SALE WHEN HE WAS NOT GIVEN NOTICE OF SALE?

STATEMENT OF THE CASE

On an Order was made by the Court to place up for sale, Ostendorff's house located at 1207 Cabin Creek Court, Fort Mill, SC. That Order is in this appeal.

Nature of action or manner: Foreclosure by SunTrust Mortgage, Inc.

Nature of defense: Ostendorff was not notified of hearing for sale of his house and thus did not appear in his behalf. Also, the original compulsory counterclaim is still in appeal under the same case number. Also, the foreclosure case is still in appeal under the same case number.

Action of Court: Order of Sale

Date of Trial: Jan 9, 2015

Mode of Trial: Master- In- Equity, no jury trial, no hearing, no witnesses.

The amount of the appeal: Residence at 1207 Cabin Creek Court, Fort Mill, SC.

Judgment appealed from : Master-In-Equity Court sale dated

However, Ostendorff only found out about the trial after the Order for Sale of Jan 9, 2015.

Date of service of notice of appeal: Jan 21, 2015.

ARGUMENTS

1. BECAUSE APPELLANT (DEFENDANT) OSTENDORFF WAS NOT NOTIFIED OF THE HEARING OF SALE OF FORECLOSED PROPERTY(HOUSE) , THEREFORE THE HEARING SHOULD NOT OF COMMENCED
-

-NOTICE

Rule 71, SCRPC, provides:

Only parties who have appeared and filed pleadings in the action shall be entitled to the usual notice of hearings and other proceedings, unless pleadings state an unliquidated claim .

By inference, in any foreclosure action where pleadings make a claim for unliquidated damages as opposed to liquidated damages, notice to all parties is required. Thus any foreclosure hearing where the plaintiff seeks recovery of the usual escrow and other expenses advanced to protect its interest in the property, which are typically unliquidated, requires notice to all parties. This is the usual practice in all actions anyway without regard to the type of damages sought.

Concerning time, plaintiff's attorney should give a minimum of ten (10) days notice of the foreclosure hearing, which is the time specified in Rule 6. SCRPC, for hearings on motions, unless the court has fixed a different period for notice.

Ref: South Carolina Foreclosure Law Manual pg 39, Foreclosure Hearings, authored by Judge Kimball.

Ostendorff has provided an affidavit that he never received the Notice of Hearing from SunTrust's attorney.

Rule 5 (a) SCRPC - " in short, every party not in default is to receive notice of each step taken

in the action." 4A C. Wright & Miller, Federal Practice and Procedure 1143(1987)

Any reasonable person would conclude that Ostendorff never got notice of hearing nor notice of sale from just that Ostendorff had never missed a hearing before , the date of filing an appeal, the date of filing Chapter 7, and emails to clerk of court asking for copies, etc.

2. BECAUSE RESPONDENT (SUNTRUST) DID NOT USE APPELLANT'S KNOWN ADDRESS OF RECORD TO GIVE NOTICE TO APPELLANT OF SCHEDULED HEARING, THEREFORE THE HEARING SHOULD NOT OF COMMENCED.....

Please see affidavit of Mark Ostendorff, dated Aug 28, 2015

3. BECAUSE THE PHYSICAL ADDRESS OF FORECLOSED PROPERTY WAS USED TO GIVE NOTICE IN WHICH THERE WAS NO MAIL BOX TO ALLOW POSTAL DELIVERY, AND THUS UNDELIVERABLE, THE HEARING SHOULD NOT HAVE COMMENCED.....

Please see affidavit of Mark Ostendorff, dated Aug 28, 2015

4. BECAUSE THE FORECLOSED PROPERTY WAS NEVER ADVERTISED TO BE SOLD, THE PROPERTY SHOULD HAVE NOT BEEN SOLD.....

SC Code 15- 39- 650, 660 require the foreclosed property to be advertised.

5. BECAUSE THE CASE WAS STILL UNDER TWO SEPARATE APPEALS AND BEING PERFECTED
IN THOSE TWO SEPARATE APPEALS, THE PROPERTY SHOULD NOT HAVE BEEN SOLD.....

The first appeal is a compulsory counterclaim , with jury, which must be heard first and findings are to bear on the foreclosure and sale hearing. See C & S Real Estate Services v . Massengale , 350, S.E. 2d. 191 (SC Supreme Ct. 1986).

The second appeal is the foreclosure hearing in which Ostendorff was never given notice. See affidavit of Mark Ostendorff dated Jan 15 ,2014.

See argument and authorities in argument number 1.

6. BECAUSE RESPONDENT SUNTRUST DID NOT POST BOND WITH YORK COUNTY CLERK OF COURT WHILE THE TWO APPEALS WERE STILL BEING PERFECTED, THE PROPERTY SHOULD NOT HAVE BEEN SOLD.....

SC CODE Section 18-9-130(A) (2), which requires "A plaintiff may not enforce a sale of property After a notice of appeal is filed without giving an undertaking or bond to the defendant, with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the defendant may sustain by reason of the sale in case the judgment is reversed..."

Ostendorff has never received any bond from SunTrust.

Ostendorff has already appealed two summary judgments from Judge Kimball. Any reasonable person would conclude that Ostendorff would also appeal any judgment from Judge Kimball from a hearing in which Ostendorff was never notified of.

The notice of sale was dated October 9, 2013. Judge Kimball should have waited at least 30 days after the judgment to see if Ostendorff would appeal.

As it stood, SunTrust could have sold the property without providing the bond as required in SC Code Section 18-9-130(A) (2), even though Ostendorff appealed Judge Kimball's order.

As it stands now, SunTrust must provide the bond if it wants to sell Ostendorff's property.

See SC Code Section 18-9-130 (A) (2). Ostendorff was not residing in the property at the time of sale. It is the responsibility of Defendant to place bond in order to prevent sale while awaiting outcome of any appeal. It is the responsibility of the Plaintiff to provide bond if it wants to sell the property while awaiting outcome of appeals. There is no legal requirement for any surety to provide anyone a bond if doesn't want to for any reason. Otherwise a person could lose all value of their property over an absurd decision by a judge that is later overturned in the appeal process.

7. BECAUSE OSTENDORFF'S PROPERTY WAS TAKEN FROM HIM WITHOUT NOTICE,
HE WAS DENIED DUE PROCESS.....

See argument and authorities in argument number 1.

8. BECAUSE OSTENDORFF'S PROPERTY WAS TAKEN FROM HIM WITHOUT DUE PROCESS,
HIS PROPERTY WAS TAKEN FROM HIM WITHOUT COMPENSATION.....

The US Constitution , 4th Amendment requires that all persons are entitled to due process and that a citizen is entitled to just compensation for any property seized from a citizen.

9. BECAUSE THE HEARING WAS ALLOWED TO PROCEED WITHOUT OSTENDORFF, HE WAS
WAS DENIED EQUAL PROTECTION UNDER THE LAW.....

Article I, Section 3 of the South Carolina Constitution provides that no" person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the law..."

The procedural due process component of this constitutional provision guarantees that a person have an "opportunity to be heard `at a meaningful time and in a meaningful manner" before he is deprived of any life, liberty or property right. Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 232, 363 S.E.2d 683, 686-87 (1987).

This due process guarantee ensures a fair " decision-making process" before the government impairs a person's life , liberty or property rights. J. Nowak , R. Rotunda and J. Young , Constitutional Law, 10.6 (3rd ed. 1986).

Any reasonable person would find it highly suspect that the Notice of Hearing was even sent to Ostendorff. SunTrust's same attorney withheld vital information from Ostendorff's discovery request but presented a favorable aspect of it in the Court of Appeals hearing for the Summary Judgment of Ostendorff's counterclaim.

Any reasonable person would find it highly suspect that a judge that has communicated ex parte with the opposing attorney. Also that a judge found a due date in a mortgage note where there was no due date to be found.

10. BECAUSE THERE WERE NO WITNESSES AT THE HEARING, THE COURT SHOULD NOT HAVE ORDERED THE SALE OF THE PROPERTY.....

A witness may be tested concerning bias, prejudice, interest, credibility, and the accuracy of his or her memory. *Martin v. Dunlap*, 266 S.C. 230, 222 S.E. 2d 8 (1976).

A jury need not accept the uncontradicted testimony of a witness, however. *Black v. Hodge*, 306 S.C. 196, 410 S.E. 2d 595 (Ct Appl 1991). Such testimony is not necessarily undisputed because there remains the question of its inherent probability and the credibility and interests of the witness. *Black v. Hodge*, 306 S.C. 196, 410 S.E. 2d 595 (Ct Appl 1991). See also *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E. 2d 425 (Ct Appl 1991)(the same is true for uncontradicted evidence in general.

The rule also applies to testimony by expert witnesses; if the jury has reason to question the expert's veracity; it need not accept the testimony, even if the testimony is not directly refuted. *Sauers v. Poulin Bros. Homes, Inc.*, 328 S.C. 601, 493 S.E. 2d 503 (Ct Appl 1997).

11. BECAUSE THE COMPULSORY COUNTERCLAIM WAS STILL IN APPEAL, THE JUDGEMENT AMOUNT COULD NOT BE DETERMINED.....

A jury must determine the facts of the counterclaim and the foreclosure is pending upon the jury trial findings.

Ostendorff demanded a jury trial on the compulsory counterclaim. "..... if there are common factual issues, the legal claim should be tried to the jury first, absent" the most imperative circumstances," and the court is bound by the jury's determination of the factual issues in the equitable action" Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 354 S.E. 2d 896(1987).

The counterclaim issue is still alive, thus the foreclosure is pending upon a jury trial findings.

12. BECAUSE OSTENDORFF'S MOTION TO COMPEL DISCOVERY WAS DENIED (WHILE OSTENDORFF WAS VERBALLY THREATENED WITH CONTEMPT OF COURT IF HE DID NOT FINISH SUNTRUST'S DISCOVERY REQUESTS WITHIN 30 DAYS OF THE HEARING OF SUNTRUST'S MOTION TO COMPEL), THAT OSTENDORFF WAS DENIED DUE PROCESS.....

Article I, Section 3 of the South Carolina Constitution provides that no" person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the law..."

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This due process guarantee ensures a fair" decision-making process" before the government impairs a person's life, liberty or property rights. J. Nowak, R. Rotunda and J. Young, Constitutional Law, 10.6 (3rd ed. 1986).

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13. BECAUSE OSTENDORFF'S MOTION TO COMPEL DISCOVERY WAS DENIED (WHILE OSTENDORFF WAS VERBALLY THREATENED WITH CONTEMPT OF COURT IF HE DID NOT FINISH SUNTRUST'S DISCOVERY REQUESTS WITHIN 30 DAYS OF THE HEARING OF SUNTRUST'S MOTION TO COMPEL), THAT OSTENDORFF WAS DENIED EQUAL PROTECTION OF THE LAW.....

See argument and authorities in argument number 12.

14. BECAUSE APPELLANT WAS NOT AT THE HEARING, THE COURT SHOULD HAVE TAKEN A POSITION AS IF WERE THE APPELLANT.....

If the Trial Court cross examines any witnesses presented by Plaintiff, then it should do so as if it was the Defendant. The Court should be competent in knowing the correct questions to ask the Plaintiff's witness. The Court did not competently question the witness as to his knowledge of securitization process within his employer (SunTrust). The court did not question the witness as to his personal knowledge of this case as the material facts are prior to March of 2007. The Court did not question the witness as to his understanding of the due date issue of making monthly construction interest payments.

15. BECAUSE PLAINTIFF REFUSED TO PROVIDE DISCOVERY , SALE SHOULD NOT HAVE BEEN GRANTED.....

The hearing was akin to a summary judgment. Recent South Carolina case law suggests that "[s] ummary judgments is not appropriate where further inquiry into the facts.... Is desirable to clarify the application of the law. Summary judgment should not be granted even where there is no dispute as to the evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Clyburn v. Sumter County School District* S.C. 429 S.E. 2d 862 (Ct Appl 1993). Accord *Metropolitan Life ins. Co. v. Fogle* S.C. , 419 S.E. 2d 825 (Ct Appl 1992).

16. BECAUSE THE CASE HAD AN EXISTING COMPULSORY COUNTERCLAIM STILL BEING PERFECTED, THE SALE PART OF THE FORECLOSURE SHOULD NOT HAVE BEEN ALLOWED TO COMMENCE.....

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The counterclaim issue is still alive, thus the foreclosure is pending upon a jury trial findings.

17. BECAUSE THE HEARING WAS ALLOWED TO PROCEED WITHOUT OSTENDORFF, HE WAS DENIED DUE PROCESS.....

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Any reasonable person would find it highly suspect that the Notice of Hearing was even sent to Ostendorff. SunTrust's same attorney withheld vital information from Ostendorff's discovery request but presented a favorable aspect of it in the Court of Appeals hearing for the Summary Judgment of Ostendorff's counterclaim.

18. BECAUSE OSTENDORFF WAS NOT GIVEN NOTICE OF SALE , THE HOUSE SHOULD
NOT BEEN PUT UP FOR SALE.

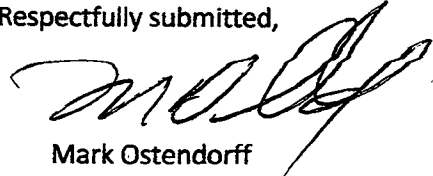
See argument and authorities in argument number 1.

CONCLUSION

For the reasons stated, this Court should reverse the order of the circuit court.

August 27, 2015

Respectfully submitted,



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STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

MAY 06 2016

SC Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

S. Jackson Kimball, Special Circuit Court

Case No. 2007- CP-46- 04305

SunTrust Mortgage, Inc.,Respondent,

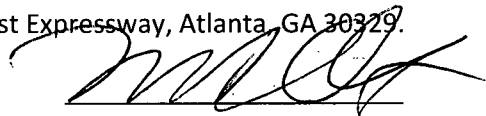
v.

Mark Ostendorff,.....Appellant.

PROOF OF SERVICE

I, Mark Ostendorff, Appellant, hereby certify that I placed a copy of the now correctly bound Final Brief in the US Postal Service, postage prepaid, to the Respondent's attorneys at : Brian S. Tatum PO Box 11250, Charlotte NC 28220 and also Susan B. Shaw, 1587 Northeast Expressway, Atlanta, GA 30329.

May 4, 2016



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