

The State of South Carolina
In The Court of Appeals
Libby Corporation, Respondent
V.

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JUN 02 2016

SC Court of Appeals

Haiyan Lin, Appellant
Appellate Case No. 2015-000350

The Honorable James O. Spence
Lexington County Master In Equity
Trial Court Case No. 2013CP3203548

Appellant's Initial Brief (Amended)

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Statement of Issues On Appeal

1. Whether the Notice of Debit or the Notice of Collect Debit Comply with Right to Cure clause of Mortgage Contract
2. Whether the Order of Reference was Procured By Fraud upon the Court
3. Whether Master-In-Equity Has Subject Matter of Jurisdiction
4. Whether Due Process Clause of the 14th Amendment Has Been Violated
5. Whether Judge Spence Violated the Judicial Code of Conduct

Statements of Case

This case involves the foreclosure action on the property located on 140 Pond Dr., Lexington SC, which was purchased by the appellant on Jan. 5, 2007. The appellant had been paying her mortgage on time until Oct. 2012. Since the business were so slow, she had to go out of town to work from Nov., 2012 till Feb. 2013. After return, the appellant was planning to catch up her mortgage payments with money earned over the road. Unfortunately she was been put in jail from Feb. 6, 2013 till May 27, 2013 wrongfully by the City of Columbia on Four bench warrants. (The case was still pending on appeal). That event had caused the lost of all money earned over the road. Therefore, the appellant had tried to work out an agreement with Mr. Witherspoon, the owner of Libby Corporation. She

was diligently working toward the resolutions by two means. One way is to work for him on job by job bases. And the other way is to lease the property for helping payments on itself. Since Mr. Witherspoon had been so nice to work with her, the appellant had no way of knowing that the foreclosure action was already under way.

Although the Notice of Debit and The Notice of Collect Debit were sent on Aug. 20, 2013 and Sep. 4, 2013, the appellant did not received them untill Oct. 8, 2013. She responded to both on Oct. 18, 2013, not knowing the fact that the Summon and Complain for the foreclosure was filed on Oct. 11, 2013. The Respondent did send the response to the appellant with so call "the Statement of the account" on Nov. 14, 2013, but still without serving the appellant with the Summon & Complain.

Further more, the respondent had filed a series court documents without serving to the appellant at all. They are contained in the case file of Lexington County Clerk of Court: the Affidavit of Non-Service on Nov. 27, 2013; the petition for Order of Service by Publication, on Dec. 5, 2013; the Order for Service by Publication on Dec. 6, 2013; Affidavits of publication on Feb. 5, 2014; Affidavit of Non-Military Service and Affidavit of Default on March 14, 2014; Petition for Order of Reference on March 21, 2014; the Proposed Order of Reference on April 4, 2014. And the order of Reference was signed and filed by the Clerk of the Court Lexington County on April 7, 2014, also without serving to the appellant.

The Notice of Hearing for May 20, 2014 was sent on May 4, 2014 and received on May 10, 2014, without

saying what is hearing about.

On May 20, 2014, when the appellant finally found the court room where the hearing was held, the hearing was already in progress, as of a default hearing. Appearance of the appellant had interrupted the respondent's plan to sailing through the default hearing, with just a few questions to the appellant. Judge Spence over ruled the default judgement and ordered the respondent to serve the appellant with the Summons and Complaint on the spot, but without serving all of the other documents that already ~~being~~ filed.

On June 19, 2014, the appellant filed her answers to the complaint. On June 25, 2014, the respondent filed his reply. And on July 24, 2014, the Notice of the Hearing for Aug 12, 2014 was served.

On Aug. 11, the appellant reviewed the case file at clerk of court, Lexington county and realized that the Order of Reference had long been obtained by the respondent without serving her.

On Aug 12, 2014, the appellant made the motion to strike the order of Reference and challenged subject matter jurisdiction of the Master-In-Equity. But judge Spence denied the appellant's motion and proceeded to hear the final hearing of the foreclosure action. During the hearing, the appellant had exposed the facts that the respondent's attorney has purposely concealed the facts to the court. But judge Spence ignored the challenging issues of collusion and conspiracy in procuring the order of Reference. He simply ordered both parties to file post trial memo to address the six issues of concerns, and directed the appellant

to file Notice of Hearing within 10 days in order to challenge the Affidavit of Attorney Fee served during the hearing.

On Aug. 20, 2014, the appellant filed the Notice of Hearing, and the hearing was scheduled on Oct. 23, 2014. On Oct. 23, 2014, the appellant made her post-trial motion of Motion For Reconsideration and Rehearing on the ground of Void the Order of Reference. But it was set aside without consideration. Then the hearing was continued for court reporter. On Nov. 12, 2014, the hearing was held for the Affidavit of Attorney's Fee. During the hearing, the appellant again confronted with the respondent's attorney with issues of fraud upon the court. To avoid to address the issues on professional misconducts head on, the judge Spence simply asked the parties to address the issues in their post hearing memo, At the end of hearing. On Nov. 21, 2014, the appellant filed her

post hearing memo, and the respondent filed the reply on Dec. 2, 2014.

On Jan. 22, 2015, the proposed order was sent for judge to review, as directed by judge spence on Jan. 9, 2015. On Jan. 23, 2015, judge spence signed Master-In-Equity's Order And Judgment of Foreclosure and Sale, without any modification. On Feb. 5, 2015, the Order was served on the appellant, and the Notice of Appeal was filed on Feb. 24, 2015.

Arguments

1. The Notice of Debit and The Notice of Collect Debit Did Not Comply with The Right to Cure Clause

The right to cure clause of the mortgage contract specifies that "The lender shall give notice to borrower prior to acceleration ---; The Notice shall specify (a) default, (b) the action required to cure the default, (c) a date not less than 30 days from the date notice is given --, (d) that failure to cure the default on or before the date specified in the notice may result in acceleration, see the transcript of Aug 12, 2014 P38 L4 to P39 L4. The three key elements must contain in the right to cure letter. ~~They~~ are: (1) mortgage in default, (2) specific amount needed to bring the payment current, (3) specific date, no less than 30 days, to cure default.

Both Notice of Debit of Aug 20, 2013 and the Notice of Collect Debit of Sept. 4, 2013 did not comply with the requirement specified in the mortgage contract. They did not give a specific amount and specific date for cure default and to reinstate the mortgage. Therefore, the acceleration of the mortgage is invalid and the foreclosure action is without cause. It shall be dismissed by the circuit court.

2. The Order of Reference was Procured By Fraud Upon Court

"Fraud upon the Court" has been defined as that "fraud committed by an officer of the court in any attempt to deceive, either by commission, by omission, by speech, by silence, by gesture, by innuendo, by look, etc." whenever this fraud is committed in a court of law by any attorney or judge, it is a "fraud upon the court." See *Engene Lee V. Armentrout et al*, 99 F.2d 242, 75 III. Dec. 703, 457 N.E. 2d 1262 (1983), and *Bulloch V. United State*. 763 F.2d 1115, 1121 (1985), etc.

It is an undeniable fact that the appellant had responded to the Notice of Debit of Aug. 20, 2013 and the Notice of Collect Debit of Sept. 4, 2013 on Oct. 18, 2013; and the respondent had sent the Statement of Account to the appellant on Nov. 14, 2013, in response to her letter. But the

respondent's attorney had conceived these facts to the clerk of court in procuring the order of Reference, see the transcript of May 20, 2014 P3 L3 to P4 L16. Especially he even perjured himself in the court that "And by way of clarification, You Honor, I want to make sure that the record is clear, the last fully paid timely installment in this case was September 5, 2011. The last payment was actually made on October 20, 2012 and notices of debit were sent out in 2013 to which there was no response" see the transcript of May 20, 2013 P5 L16 to L23. Again he had conceived these facts to the court during Aug. 12, 2014 hearing, see the transcript of Aug. 12, 2014 P113 L23 to P115 L16, until the appellant introduced them as evidences into the defendant's exhibits No. 1 & No. 2. On ~~Oct. 23~~^{Nov. 12}, 2014, Mr. Joseph A. Vasquez did admitted that he has personally received the appellant's response letter of Oct. 18, 2013.

It is very interesting to see that how he had contradicted with himself in defending his acts of fraud upon the Court during the hearing of Nov. 12, 2014, see the transcript of Nov. 12, 2014 P 8 L 3 to P 31 L 17.

On May 20, 2014, Mr. Joseph A. Vasquez did admit that "We have that (P.O. Box 1011, Columbia, SC 29202) as an address of record, see the transcript May 20, 2014, P 17 L 9. And he had personally received the response of Oct. 18, 2013 from the appellant. But from Oct. 11, 2013, the date of the Summons and Complaint was filed, till April 4, 2014, the date of the Order of Reference was issued, there were no certificates of Services contained in the case file to evidence that all of the documents filed were served to the appellant before May 4, 2014, when the Notice of Hearing of May 20, 2014 was sent, beside the Statement of Account of Nov. 14, 2013. It is obvious that he had knowingly violated the Rules of Civil Procedure and intentionally fraud upon the court in the efforts of depriving due

process right of the appellant.

In *Ward v. Southfield* 102 N.Y. 287, 292, the court point out that "fraud practiced upon a party or the court during the trial or in prosecuting the action, or in obtaining the judgment. It may be attacked collaterally and on account thereof set aside and vacate". See also *United State v. Throckmorton*, 98 U.S. 61 (1878), and *Homer v. Fish*, 7 Pick 435 (Mass, 1823).

3. Master-In-Equity Lacks of Jurisdiction To Hear The Case.

The Order of Reference is a void order, since it was procured by "fraud upon the Court". Since a "fraud upon the court" vitiates entire case, all the VOID Order / Judgments rendered must be stricken as orders from the court, as none of the courts held subject matter Jurisdiction. No court has the lawful authority to validate a void order as result of "fraud upon the court." See *U.S. v. Throckmorton*, 98 U.S. 61, 25 L. 2d 93 (1878); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997 (1943); *Garcia* 109 B.R. 335 (N.D. Illinois, 1989); etc.

Jurisdiction of the Subject Matter is always conferred "by law", see *Martin v. Schillo*, 369 F.2d 607, 60 N.Z. 2d 392 (1945). An Order of Reference is only way that the equity court derive its subject matter jurisdiction, see *Bunkum v. Manor Properties* 321 S.C. 95, 467 S.E. 2d 758 (Ct. App. 1996).

Pursuant Rule 53, SCRPC, a Master has no power or authority except that which is granted by the order of Reference, see *Smith v. Ocean Lake Family Compground* 315 S.C. 379, 381 (1993).

The Order of Reference of April 7, 2014 established the Master-in-Equity's subject matter jurisdiction to hear the case. Beside the fraud upon the court, ~~big~~ overturn of the default judgment, Judge Spence had automatically overturned the order of Reference, since the Order of Reference by default is based on solely on Affidavit of Default, invalidating the default judgement deemed the Order of Reference VOID. Therefore, Judge Spence has also terminated his own subject matter jurisdiction over the case when he overturned the default judgment.

"A master who acts after the reference terminates does so without subject matter jurisdiction, and the resulting orders are void," see *Bunkum v. Manor properties* 321 S.C. 95, 99, 467 S.E.2d 758 761 (ct. App. 1996).

Subject matter of jurisdiction of the Master-In-Equity has been challenged by the appellant during the hearing of Aug. 12, 2014 and with the Motion For Rehearing of Oct. 23, 2014. But the issues of Subject Matter jurisdiction may be challenged at any time, cannot be waived even by consent, and shall be taken notice by the appellate court by its own motion, See Johnson V. State, 319 S.C. 62, 64, 459 S.E. 2d 840, 841 (1995).

Without the subject matter jurisdiction, the Master-In-Equity is without any authority to hear the case. Any rulings made are illegal and are deemed forever void. Therefore, this court, with his own motion, shall issue an order to vacate the Master-In-Equity's void orders and judgements.

4. The Appellant's Due Process Right Has Been Violated

5th Amendment of US Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law"; *id.*, 14th Amendment of US Constitution provides that no state shall deprive any person of life, liberty, or property, without due process of law.

"Central meaning of procedural due process is the right to notice and an opportunity to be heard, ---, in a meaningful time and in a meaningful manner, see *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); also see *Greene v. Lindsey* (5/19/82), and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

"If the name and address of an individual is reasonably ascertainable, then notice by publication is insufficient to satisfy due process" see *Montgomery v. Scot*, 802 F. Supp. 930, 935 (1992). As also in *United State v. Borromeo*, 945 F. 2d 750, 752 (4th Cir 1991), "service by publication is constitutionally insufficient where actual notice by mail is feasible."

Furthermore, the Affidavit requesting service by publication did not meet strict statutory requirements. As in Sanders V. Sanders 278A, 2d 615, 618 (Md Ct. Sepc. App. 1971), the Court states that "there must be a strict compliance with the statutes and rules on constructive service; Compliance is jurisdictional and if any essential statutory step is omitted, the decree rendered on such service is void", also see McGee V. McGee, 22, 50, 2d 788, 789-90 (Fla, 1945).

Although judge spence had overturned the default judgment, he refused to set aside or to vacate the order of Reference. By denying the appellant's Motion For Rehearing back to circuit court, he has deprived the appellant's due process right to be heard in a proper court and with meaningful manners. Without participating circuit court proceedings, such as pre-trial motions, discovery, and dispositions, the heavily contested issues could not be resolved and disposed of.

In this case where the appellant has been prevented from exhibiting fully her

case by fraud and deception practiced on her by the respondent. Therefore the appellant seeking relief against the final judgment, because "she has been" prevented from fully presenting all of her case to the court," see United State V. Throckmorton 98 US 61 (1878). This relief is constitutionally guaranteed by 14th Amendment of US constitution.

5. Judge Spence Violate Judicial Code of Conduct By Failing To Uphold Integrity and Independence of The Judiciary

Canon 1 of SC Judicial Code of Conduct states that "A Judge shall Uphold the integrity and Independence of the Judiciary". Judge Spence has violated Judicial Code of Conduct by failing to uphold Integrity and independence of the judiciary. During the hearing of Aug. 12, 2014 and Nov. 12, 2014, the misconducts of the respondent's attorney have been exposed right in front of judge Spence, but he choose to ignor the issue of professional misconducts, every time it came to the light, see the transcript of Aug 12, 2014 P110L24 to P120L21 and the transcript of Nov. 12, 2014 P8L4 to P32L12.

Rule ~~407~~ 7, SCACR specifies code for Professional Conduct. The respondent's attorney has committed the professional misconduct specified in
21.

Rule 8.4 (a) "violate or attempt to violate the Rule of Professional conduct," such as Rule 3.3 (a)(1) "Lawyer shall not knowingly make false statement of fact to tribunal;" and Rule 8.4 (d) "engage in conduct involving dishonesty, fraud, deceit or misrepresentation;" (e) engage in conduct that is prejudicial to the administration of justice.

~~The~~ Rule 413, SCACR is Rule for Lawyer Disciplinary Enforcement: Rule 7(a)(1) said "It shall be ground for disciplinary enforcement for lawyer to violate Rules of professional conduct;" Rule 7(a)(5) said "It shall be ground to discipline for lawyer to engage in conduct tending pollute administration of justice or bring court or legal profession to disreput or conduct demonstrating unfitness to practice law".

"self regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation

of the Rules of Professional Conduct." As a member of the profession, a judge shall always report violations of ~~the~~ Rules of Professional Conduct in order to uphold the integrity and independence of the Judiciary, as required by Rule 8.3(b) of Rule 407, SCACR. Judge Spence has failed to perform this outmost legal duty in attending this foreclosure legal proceeding."

Conclusion

For the reasons stated herein, We conclude that: (1) this foreclosure action is without cause, because it violates the mortgage contract of the right to cure clause; (2) the Order of Reference is deemed forever VOID as a result of fraud upon the court; (3) the Master-In-Equity lacks subject matter jurisdiction to hear the case, on the base of the VOID Order of the Reference; (4) the Order For Foreclosure and sale violates due process clause of 14th Amendment of US Constitution. Therefore, this court shall vacate the Order For Foreclosure and Sale, in order to protect the appellant's due process right under the law and to restore the integrity of the judiciary.

May 30, 2016

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