

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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JUL 18 2016

SC Court of Appeals

Gordon G. Cooper, Master In Equity

Appellate Case No. 2016-001014

ATCF REO HOLDINGS LLC,

Respondent,

v.

JAMES K. HAZEL JR., et al,

Appellant.

INITIAL BRIEF OF APPELLANT

James K. Hazel Jr.
517 Wildwood Drive
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(864) 278-0551
Appellant

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Transcript of Master In Equity Hearing

STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER IN EQUITY ERR IN DENIAL OF APPELLANTS DEMAND FOR JURY TRIAL?
2. DID MASTER IN EQUITY LACK SUBJECT MATTER JURISDICTION?
3. WAS IT AN ABUSE OF DISCRETION FOR MASTER IN EQUITY TO DENY APPELLANT THE RIGHT TO CROSS EXAMINE RESPONDENTS WITNESS?

STATEMENT OF THE CASE

Respondent served the Pleadings upon Appellant on June 19, 2015, as evidenced by the Affidavit of Service filed on July 20, 2015. On June 26, 2015, Appellant filed a Motion for Enlargement of Time, and Respondent consented to this motion through a Consent to Motion to Enlarge Time filed on July 10, 2015. Appellant timely served a Motion to Dismiss, which was filed on August 13, 2015, and timely served an Answer, which was filed on August 14, 2015. The court denied the Motion to Dismiss through an Order filed on November 3, 2015. On March 22, 2016, Respondent served Notice of the Hearing upon all named defendants, and the Notice of Hearing was filed on March 25, 2016. This appeal from the Order issued on April 15, 2016 follows.

ARGUMENTS

I. DID THE MASTER IN EQUITY ERR IN DENIAL OF APPELLANTS DEMAND FOR JURY TRIAL?

In the Order denying Appellants Demand For Jury Trial (Exhibit I) the Master cited *Rosenbaum v. S-M-S 32*, 427, S.E.2d 897, at 898 (1993) (Exhibit 1, pg.2, para. 2)

"Considering the unique circumstances existing in a tax forfeiture acquisition, and the prevailing statutory provisions governing suits to clear tax titles, we conclude that the appellant may not evade the intent of the legislature and obtain the right to a jury trial by interposing a counterclaim designed to thwart the reasonable and practical implication of Chapter 61." (Exhibit XVII)

During the hearing, the Appellant requested the Master allow the presentation of "statutory information" to show the right to a jury trial. (*Transcript*, pg. 3, ln. 3-5) Even though Respondent had no objection; (*Transcript*, pg. 3, ln. 9) the Master ruled without allowing the Appellant to present the statutory evidence in opposition to *Rosenbaum*.

The Respondent filed Summons and Complaint in this action on June 4, 2015. (Exhibit II) pursuant to *SC Code Ann. § 12-61-10* through **60** and *SC Code Ann. § 15-67-10* through **100**. (Exhibit II, pg. 3, para. 1) *SC Code Ann. § 15-67-100* states:

"SECTION 15-67-100. Right to jury trial unchanged.
Nothing in this article shall be construed or held to change the existing law in reference to trials by jury in all actions of trespass to try titles, trespass quare clausum fregit or ejectment or other action to recover possession of real estate." (Exhibit III, pg. 3)

In *Rosenbaum*, the respondent brought the complaint specifically pursuant to SC Code Ann. § 12-61-10 and SC Code Ann. § 12-61-20. See *Rosenbaum v. S-M-S 32*, 427, S.E.2d 897 (1993) which states:

"In December of 1990, respondent instituted this action pursuant to SC Code Ann. § 12-61-10, et seq. (1976), seeking a declaration of clear title."

Chapter 61 does not address the issue of a jury trial. Chapter 67, as restated above, does address this issue in specific terms.

The appellants Answer, (Exhibit IV) Motion To Dismiss (Exhibit V) and statements during the hearing (*Transcript* pg. 20, ln.5-25) and (*Transcript* pg. 21, ln.1-21) indicate that the Appellant believed the tax sale of his home was illegal due to a Breach of Contract and Fraud by the lender, and improper statutory notice by the tax collector, which Appellant believes are legal issues and compulsory counterclaims. The court held in *Johnson v. South Carolina Nat. Bank*, 354 S.E.2d 895, 897 (1987) "If the complaint is equitable and the counterclaim legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." (Exhibit VI) The Order at issue, pg. 5, para. 1, acknowledges that appellant timely raised the counterclaim pursuant SC Rules Civ. Proc., Rule 12(b)(6), Motion to Dismiss prior to the case being referred to the Master in Equity.

In this case, the respondents equity action seeks possession of Appellants home arising from the tax sale. The legal counterclaim is that the Respondents purchase was not legal due to Fraudulent Conveyances, a Breach of Contract and Fiduciary Duty, and Improper Notice. There is a logical relationship between the counterclaim and the claim. The counterclaims are compulsory, and Appellant is entitled to a jury trial on the counterclaims. Appellant believes that The Honorable

Gordon G. Cooper, Master in Equity, did not have jurisdiction to hear the compulsory legal counterclaims of Appellant. The SC Supreme Court has held in *First-Citizens Bank and Trust Co. of South Carolina v. Hucks*, 408 S.E.2d 222, 223 (1991) "The master is without jurisdiction to conduct jury trials. Thus, the legal issues in this case should not have been referred to the master for final adjudication. Where the issues are complicated, a case may be referred to a master for the limited purpose of making factual findings to be received by the circuit court as evidence only." (Exhibit XII) The denial of the Demand For Jury Trial precluded further proceedings since the SC Supreme Court citing the US Supreme court, also held in *Johnson* at 897 that " absent the "most imperative circumstances," *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), the "at law" claim must be tried first." Furthermore, *S.C. Rules Civ. Proc.*, Rule 13(a),

"Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction"

The testimony of Mr. Robert E. Metts, Jr., under direct examination by Mr. Barnes, indicates that the Appellant did not receive the final notice sent on July 11, 2013. (*Transcript* pg. 10, ln.18-21) The tax sale took place on November 18, 2013. The Order indicates that the tax deed was issued to MTAG, as Custodian for ATCF II, South Carolina LLC, (hereafter referenced as MTAG) on March 24, 2015. (Exhibit I, No. 6) The published record of the Spartanburg County Assessor's Office, dated July 16, 2016, indicates that until March 24, 2015, the Appellant was the owner of record.

(Exhibit VII, pg. 2) MTAG, did not initiate any legal action to possess the Appellants home. The Respondent purchased the home from MTAG on April 26, 2015 (Exhibit X) and on June 4, 2015 initiated the current action and at that time informed the Appellant. Until June 4, 2015, based upon Spartanburg County Records, the Appellant believed that he was the legal owner and that the only challenge to that ownership was the lender which, unknown to the Appellant, purposefully withheld the tax payments. The withholding of which initiated the tax sale. On June 4, 2015 the Respondents legal action alerted the Appellant to the issue. The Appellant never sought out the overage prior to this filing because he was unaware of a valid tax sale. The Appellant sought out the tax overage, pursuant to SC Code Ann. § 12-51-130. (Exhibit XI) The Respondent was not a party to the tax sale, purchasing the property from MTAG on April 26, 2015. As indicated above, the Respondent filed Summons and Complaint pursuant to SC Code Ann. § 12-61-10 through 60 and SC Code Ann. § 15-67-10 through 100. As such the Respondent was without standing to object to the payment of the overage to the Appellant as a basis for ruling in Respondents favor. The Respondent had nothing to do with the payment of the overage. The Public Index of the Spartanburg County Seventh Judicial Circuit (Exhibit VIII) indicates that the Appellant was involved in litigation with the lender prior to the tax sale (Exhibit VIII, box 10) and after the tax sale. (Exhibit VIII, boxes 1, 3, and 5) In King v. James, 694 S.E.2d 35 (2010) at 42, (Exhibit IX) this Court held: "A waiver is a voluntary and intentional abandonment or relinquishment of a known right" and that "In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned." (citations omitted) As in King, the Appellant was not aware of the sale and could not have reasonably been expected to assert a right prior to the sale. Acceptance of the overage had no bearing on the validity of the tax sale. This was an issue for the circuit court and not the Master In

Equity. *King v. James*, 694 S.E.2d 35 (2010) at 42 "The determination of whether one's actions constitute waiver is a question of fact." The Master In Equity erred in denying the Appellants Motion For Jury Trial

II. DID MASTER IN EQUITY LACK SUBJECT MATTER JURISDICTION?

As referenced above, the Order at issue, pg. 5, para. 1, acknowledges that Appellant timely raised the counterclaim pursuant SC Rules Civ. Proc., Rule 12(b)(6), Motion to Dismiss on August 13, 2015. The Order of the Honorable L. Casey Manning, Circuit Court Judge denying Appellants Motion was filed on November 3, 2015. On December 9, 2015, pursuant to SC Rules Civ. Proc., Rule 53(b), Respondent filed Motion for Mandatory Order of Reference. Rule 53(b) states in pertinent part that:

"In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case." (Exhibit XIII)

The Appellant did not consent to the Order of Reference, this is not a default case or an action for foreclosure. The above rule only permits the Clerk of Court to grant the motion under specific circumstances. "In all other actions," the Circuit court must refer it to the master. The Circuit Court did not issue an Order or Ruling granting the Motion. "The master-in-equity is considered a division of the circuit court and obtains jurisdiction through and order of reference from the circuit court." Katzburg v. Katzburg, 767 S.E.2d 3, 5 (2014) (Exhibit XIV) Instead the Mandatory Order of Reference was signed by the Spartanburg County Clerk of Court. (Exhibit XV) As the circuit court did not issue an Order granting the Respondents motion, the Master in Equity did not have subject

matter jurisdiction over the case and the Order issued is void. "A court, lacking subject matter jurisdiction, cannot enforce its own decrees. It would serve no useful purposes to determine issues submitted to the court since the jurisdiction as to subject matter can be raised at any time" Hallums v. Bowens, 428 S.E.2d 894, 895 (Ct.App.1993)

The record presented above establishes that the Respondent filed this case in Circuit Court pursuant to SC Code Ann. § 12-61-10 and SC Code Ann. § 15-67-10. Chapter 61 does not address the issue of referring the action to a master. Chapter 67 (Exhibit II, pg. 2) is very specific and SC Code Ann. § 15-67-70 states in part:

"In all actions brought under this article the court, or a judge thereof, shall refer the action to a master or special referee to take the testimony as to the plaintiff's claim or title and as to all the facts and circumstances unless the testimony shall be taken in open court and carefully inquire as to the existence of claim by and residence of all nonresidents."

While Rule 53(b) grants the Clerk of Court limited authority to refer the action to the master, and Appellant contends the Clerk did not in this instance have the authority, (pursuant to the Rule and definition of the subject matter); moreover, the above statute requires that only the Circuit Court has such authority. Since this action was referred by the Clerk of Court, the Master In Equity lacked subject matter jurisdiction over the case.

III. WAS IT AN ABUSE OF DISCRETION FOR MASTER IN EQUITY TO DENY APPELLANT THE RIGHT TO CROSS EXAMINE RESPONDENTS WITNESS?

The master allowed the sworn testimony of Robert E. Metts, Jr., Spartanburg County Tax Collector under Direct Examination by the Respondent. (*Transcript* pg. 8, ln.11 to pg. 16, ln. 19) The master allowed the Appellant to begin Cross Examination of Mr. Metts (*Transcript* pg. 16, ln.20); however, the master stopped the Appellants cross examination when the Appellant attempted to introduce the Statute SC Code Ann. § 12-45-75 which details the redemption payment. (*Transcript* pg. 17, ln.24-25). After which, the master took charge of the hearing, restating the testimony of the witness as a fact without allowing the Appellant to dispute the testimony. (*Transcript* pg. 19, ln.6-25) The master, after questioning the Appellant, ruled in favor of the Respondent and barred any further cross examination by the Appellant (*Transcript* pg. 26, ln.12-14) even though the witness testified that the notice was not received by the Appellant. (*Transcript* pg. 10, ln.18-21) In the Order (Exhibit I, pg. 6, para. 1) the master states that "no other witnesses were called" but the master did not allow other witnesses to be called and refused to allow the Appellant to continue the cross examination. The master held that the sale was "In strict accordance with all statutory requirements" (Exhibit I, pg. 7, #6) but never allowed Appellant opportunity to introduce the statutes in opposition to his reasoning. Even though the witness clearly testified that notice was not received by the Appellant. (*Transcript* pg. 10, ln.18-21) Appellant believes that this was an abuse of

discretion and the ruling of the S.C. Supreme Court in *North Greenville College v. Sherman Const. Co., Inc.*, 243 S.E.2nd 441 (1978) at 442 that: "While we recognize the broad discretion of a trial judge in the cross-examination of witnesses and the admission of evidence, that discretion is not unbridled." gives the court authority to find an abuse of discretion in this case. (Exhibit XVI)


CONCLUSION

The Appellant asserts that based upon the legal issues presented to this Court:

- I. Appellants Demand for Jury Trial Be Granted;
- II. The case be returned to the Circuit Court and Appellant receive a Jury Trial as requested by motion;
- III. Tax Sale voided;
- IV. Appellant and family be allowed to remain in their home during the litigation and pay any taxes owed for this year and until litigation is completed.
- V. For the reasons stated, this Court should reverse the judgment of the Master In Equity.

July 17, 2016

Respectfully Submitted



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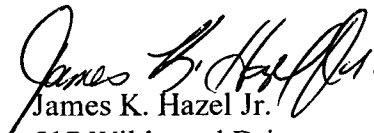
Appellant.

PROOF OF SERVICE

I, James K. Hazel, Jr., do hereby affirm that *Initial Brief of Appellant, Exhibits, Appendices and Transcript* was placed into the United States Mail with the First Class Postage duly affixed and a return address clearly indicated on the envelope, for deposit in the United States Mail, addressed to the following person(s):

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July 18, 2016


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