THE STATE OF SOUTH CAROLINA

In The Supreme Court

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SC Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Appellate Case No. 2013-002432

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

v.

Mark Ostendorff,.....Appellant.

PETITION FOR A WRIT OF CERTIORARI

Mark Ostendorff
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Central, SC 29630
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Appellant, pro se

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Attorney for Respondent

INDEX

TABLE OF AUTHORITIES

CERTIFICATE OF COUNSEL

Pro se certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 18, 2016.

QUESTIONS PRESENTED

1. DID THE TRIAL COURT ERR IN ALLOWING THE HEARING TO PROCEED WITHOUT DEFENDANT OSTENDORFF'S APPEARANCE AS WAS NOT NOTIFIED OF THE FORECLOSURE HEARING?

2. DID THE TRIAL COURT ERR IN ALLOWING A SURPRISE WITNESS TO TESTIFY ?

3 DID THE TRIAL COURT ERR IN CONSIDERING SUNTRUST'S WITTNESS AS CREDIBLE IN REACHING A JUDGMENT?

4. DID THE COURT ERR IN PUTTING UP THE PROPERTY UP FOR SALE WHEN OSTENDORFF WAS NOT GIVEN NOTICE OF SALE?

5. DID THE COURT ERR IN ALLOWING THE HEARING TO PROCEED WITHOUT REQUIRING SUNTRUST TO PROVIDE A BOND ON THE PROPERTY ?

6. DID THE COURT ERR IN ALLOWING THE HEARING TO PROCEED WITHOUT TAKING THE APPELLANT'S POSITION , AS APPELLANT WAS NOT PRESENT?

7. DID THE COURT ERR IN GRANTING FORECLOSURE WHEN PLAINTIFF NEVER PROVIDED DISCOVERY ?

8. DID THE COURT ERR IN ALLOWING THE FORECLOSURE HEARING TO COMMENCE WHILE THE COMPULSORY COUNTERCLAIM WAS IN THE S.C. SUPRME COURT ?

9. DID THE COURT ERR IN DETERMINING THE JUDGMENT AMOUNT WHEN THE COMPULSORY COUNTERCLAIM WAS STILL UNDER APPEAL ?

10. DID THE COURT DENY OSTENDORFF DUE PROCESS AS HE WAS NOT PRESENT AT THE HEARING ?

11. DID THE COURT DENY OSTENDORFF EQUAL PROTECTION OF THE LAW ASHE WAS NOT PRESENT AT THE HEARING ?

12. DID THE COURT DENY OSTENDORFF DUE PROCESS AS HE WAS ORDERED TO PROVIDE DISCOVERY WHILE SUNTRUST WAS NOT ORDERED TO PROVIDE DISCOVERY ?

13. DID THE COURT DENY OSTENDOREFF EQUAL PROTECTION OF THE LAW AS HE WAS ORDERED TO PROVIDE DISCOVERY WHILE SUNTRUST WAS NOT ORDERED TO PROVIDE DISCOVERY ?

STATEMENT OF THE CASE

On November 30, 2007 SunTrust brought foreclosure action against Mark Ostendorff for failing to pay monthly interest payments. Ostendorff counterclaimed with a compulsory counterclaim. Ostendorff counterclaimed for damages because SunTrust stopped construction draws without explanation or warning and thus Ostendorff was not able to complete the rehab work on his house. Ostendorff paid the monthly interest payments for seven months after SunTrust stopped construction draws. Ostendorff had numerous offers for a cash –out refinancing but each offer required the house to be completed in order to refinance and receive cash of at least $250,000 dollars at closing.

On December 18, 2009, a summary judgment was granted to SunTrust . The Court based its decision on that Ostendorff made his monthly interest payments after the due date(along with some imagined items). Nothing in the contract documents ever stated a specific due date. Ostendorff had an agreement with SunTrust that he would make the monthly interest payments by the end of each month to which he did. An affidavit by Susan Walker(SunTrust) never addressed why the construction draws stopped , only why the final draw and the conversion to a permanent loan was not made and that reason was because Ostendorff stopped making his monthly payments altogether, which was seven months after the last construction draw from SunTrust. Susan Walker's affidavit never addressed any issue of interest payments paid by Ostendorff were past a due date. Nothing in the pleadings addressed any issue of the due date. The only time the due date was ever brought up was by SunTrust's attorney during the summary judgment hearing which was a " trial by ambush" .

Ostendorff filed an Appeal on that summary judgment. The Court of Appeals affirmed the lower court's decision. Ostendorff then filed a Petition of Writ of Certiorari with the SC Supreme Court.

That Petition for Writ was denied. There was no opinion given nor any explanation for that denial only a one line statement that it was denied. An odd coincidence occurred just before that denial in that the opposing party moved to the Court of Appeals to dismiss the appeal being made on the separate foreclosure appeal. Ostendorff filed a reply to the Court of Appeals opposing the motion to dismiss and that motion was denied. Otendorff did not oppose any motion to dismiss the appeal (petition for writ) to Supreme Court as one was never served on him, only to the Court of Appeals.

Ostendorff then filed an appeal with the U S Supreme Court. The U S Supreme Court quickly returned Ostendorff's appeal citing that it appeared that Ostendorff was not denied "discretionary review" and thus could not be considered review by the U S Supreme Court. No appeal will be heard by the the U S Supreme unless it has been decided by the court of last resort in the applicable state. Ostendorff asked the Clerk of Court of SC Supreme Court for any information denying discretionary review so he could resubmit his appeal to the U S Supreme Court. The Clerk of Court at the SC Supreme Court essentially told him to consult an attorney specializing in the US Supreme Court.

The foreclosure case hearing was held and ordered on October 1, 2013. Ostendorff was not present at that hearing as he was notified of such hearing. Ostendorff then filed an appeal on that foreclosure hearing judgment with the SC Court of Appeals. The judgment was affirmed and Ostendorff is now filing this Petition for Writ on that judgment.

ARGUMENTS

1. BECAUSE APPELLANT (DEFENDANT) OSTENDORFF WAS NOT NOTIFIED OF THE HEARING OF FORECLOSURE, THEREFORE THE HEARING SHOULD NOT HAVE BEEN HEARD.

-NOTICE

Rule 71, SCRCP, 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. SCRCP, 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) SCRCP - " 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 THE WITTNESS WAS SRPRISE WITTNESS, HIS TESTIMONY SHOULD NOT HAVE BEEN HEARD.

SCRCP

Rule 33 (b) requires other party to "..give names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case...".

Per Judge Kimball's Order, a Rich Willits, VP at SunTrust Mortgage, Inc. appeared at the hearing. (It may also be noted that the Order also indicated that Mark Ostendorff, Defendant pro se appeared at the hearing, but I did not). Willits's name has never been mentioned in this case or name on any written document or discovery at all. Only an affidavit by Susan Walker has provided anything and that was an affidavit by her in the counterclaim by Ostendorff.

The trial court is under a duty to delay the trial for the purpose of ascertaining the type of witness involved and the content of his evidence, the nature of the failure or neglect or refusal to furnish the witness's name,and the degree of surprise to the other party, including prior knowledge of the name by that party. Callen v. Callen, 365 S.C. 618, 620 S.E. 2wd 59(2005).

3. BECAUSE THEWITNESS FOR SUNTRUST WAS NOT A CREDIBLE WITNESS , HIS TESTIMONY SHOULD NOT HAVE BEEN CONSIDERED IN REACHING A JUDGMENT.

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,m 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 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).

If Ostendorff had been given notice of hearing, he would object to the surprise witness Willits. If allow to testify, Ostendorff would have cross examined Willits to show he did not understand how SunTrust securitized its mortgages. In fact, securitizing mortgages before they were even made was industry common place practice.

Further more ,Ostendorff would show the court that , through Willits cross examination ,there was no due date on Ostendorff's construction loan. This issue is the heart of Judge Kimball's findings of fact to justify Ostendorff's compulsory counterclaim dismissal through summary judgment under Rule 56(c).

4. BECAUSE OSTENDORFF WAS NOT GIVEN NOTICE OF SALE, THE FORECLOSED PROPERTY SHOULD NOT BEEN PUT UP FOR SALE

Ostendorff would have lost any right to appraisal under SC Code 29-3-680

5. BECAUSE SUNTRUST NEVER PROVIDED A BOND ON THE PROPERTY, SUNTRUST SHOULD NOT HAVE BEEN ALLOWED TO PROCEED WITH THE FORECLOSURE HEARING.

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 sureities, 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.

6. BECAUSE APPELLANT WAS NOT AT THE HEARING AT PROCEEDED WITH THE HEARING , THE COURT SHOULD HAVE TAKEN THE POSITION AS IF IT 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.

7.BECAUSE THE PLAINTIFF REFUSED TO PROVIDE DISCOVERY, FORECLOSURE 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).

8. BECAUSE THE CASE HAD AN EXISTING COPULSORY COUNTERCLAIM IN THE SC SUPREME COURT , THE FORECLOSURE PART OF THE CASE SHOULD NOT HAVE BEEN ALLOWED TO COMMENCE.

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.

9,BECAUSE THE COMPULSORY COUNTERCLAIM WAS IN APPEAL , THE JUDGMENT AMOUNT COULD NOT HAVE BEEN DETERMINED.

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

(see #8 argument for authorities)

10. BECAUSE THE HEARING WAS ALLOWED TO PROCEED WITHOUT OSTENDORFF, HE 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..."

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.

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

The equal protection clause of the South Carolina Constitution parallels that of the United States Constitution. Article I , Section 3 of the South Carolina Constitution provides that no person shall be denied the equal protection of the laws. S.C. Const. art I, $ 3.

Although the Supreme Court of South Carolina has stated that the concept of equal protection of the laws is " difficult to define and not susceptible of exact delimitation," it has provided general guidance on the subject:

[T]he constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under similar circumstances and conditions, both in the privileges conferred and in the liabilities imposed....The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated. Thompson v. South Carolina Comm'n on Alcohol and Drug Abuse, 267 S.C. 463, 471, 229 S.E. 2d 718, 722 (1976). , Marley v. Kirby, 271 S.C. 122, 245 S.E. 2d 604 (1978)., Thompson , 267 S.C. at 471, 229 S.E. 2d at 722.

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.

(see # 10 above for argument and for authorities)

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 MOTIONB TO COMPEL), THAT OSTENDORFF WAS DENIED EQUAL PROTECTION OF THE LAW.

(see # 11 above for argument and authorities)

CONCLUSION

For the reasons stated, petitioner respectfully submits that the Court should reverse the judgment of the Court of Appeals and order a new trials for both the Compulsory Counterclaim and then the Foreclosure.

Respectfully submitted,

Mark Ostendorff

Appellant, pro se

September 16, 2016

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

S. Jackson Kimball, III, Master-In-Equity

Appellate Case No. 2013-002432

Lower Court Case No. 2007-CP-46-04305

SunTrust Mortgage, Inc., ...Respondent,

v.

Mark Ostendorff, ...Appellant.

PETITION FOR REHEARING

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Appellant Ostendorff requests this Court for a Rehearing on its decision to Affirm the lower Court's Order of Foreclosure. Appellant Ostendorff's request is based on:

*Johnson v. South Carolina Nat'l Bank,292 S.C.*51,354 SE 2d 896 (1987)....the court is bound by the jury's determination of the factual issues...

C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299,350 S.E. 2d 191 (1986)...4) if the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim...

1) That the compulsory counterclaim was an issue of fact, not one of law.
2) That Appellant demanded a jury trial on that compulsory counterclaim.
3) That any findings of that jury trial would be bearing on any decision for any ,if at all, on a subsequent foreclosure hearing.

S.C. Code of Laws, Section 18-9-280. Written opinions required; memorandum opinions.

When a judgment or decree is reversed or affirm by the Supreme Court every point made and distinctly ....shall be concisely and briefly stated in writing....

4) That Appellant's denial for Petition for Writ from the South Carolina Supreme Court on the dismissed counterclaim was not considered as being denied discretionary review by The United States Supreme Court and thus not appealable to The United States Supreme Court.

*Tolk v. Weinstein,*265 S.C. 546, 220 S.E. 2d 239 (1975).

5) That the trial court's dismissal of appellant's compulsory counterclaim was not supported by the evidence

*Callen v. Callen,*365 S.C. 618, 620 S.E. 2d 59 (2005). The trial court is under duty to delay the trial for purpose of ascertaining.....including prior knowledge of the name by that party.

6) That at the foreclosure hearing, Appellant was denied to cross examine a witness that was unknown to Appellant. The witness's name was not known to Appellant in all of his dealings with SunTrust.
7) That Appellant would show the court through cross examination of SunTrust's witness that Appellant was never in breach of his construction loan agreement and that SunTrust caused material interference of Appellant's later inability to make monthly payments.
8) That the trial court judge never asked SunTrust's witness why SunTrust stopped Appellant's construction draw requests.
9) That the trial court judge never asked SunTrust's witness why SunTrust never sent Appellant any notice of breach , as required in the loan agreement, prior to stopping construction draw requests.

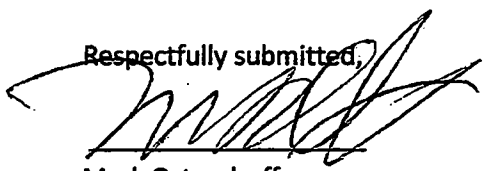
10) That at the foreclosure hearing, Appellant was denied to show the court through cross examination that the witness had no knowledge of SunTrust's securitization process, and that SunTrust was not the real party in interest. Appellant has made numerous claims that SunTrust was not the real party in interest any requested from SunTrust the name(s) of the real party in interest.

11) That the trial court judge never asked SunTrust's witness to explain in any depth SunTrust's securitization process to ensure that the witness was of any credibility.

Appellant requests this Court to Rehear its decision to Affirm. Appellant requests that this case be remanded back to a lower court to hear the original compulsory counterclaim with a jury as the finders-in-fact.

July 1, 2016

Respectfully submitted,



Mark Ostendorff

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SunTrust Mortgage, Inc., Respondent,

v.

Mark Ostendorff, Appellant.

Appellate Case No. 2013-002432

Appeal From York County
S. Jackson Kimball, III, Master-in-Equity

Unpublished Opinion No. 2016-UP-318
Submitted May 1, 2016 – Filed June 22, 2016

AFFIRMED

Mark Ostendorff, of Central, pro se.

Brian Steed Tatum, of Charlotte, North Carolina, for Respondent.

PER CURIAM: Mark Ostendorff appeals the master-in-equity's order finding SunTrust Mortgage, Inc. (SunTrust) was entitled to a foreclosure of its mortgage and the mortgaged property (the property) would be sold at public auction. On appeal, Ostendorff argues the master-in-equity erred in (1) allowing the hearing to proceed in his absence because he did not receive notice of the foreclosure hearing,

(2) allowing a surprise witness to testify, (3) considering SunTrust's witness credible, (4) putting the property up for sale when Ostendorff was not given notice of the sale, (5) allowing the hearing to proceed without requiring SunTrust to provide a bond on the property, (6) allowing the foreclosure hearing to proceed without taking Ostendorff's position, (7) granting foreclosure when SunTrust never provided discovery, (8) allowing the foreclosure hearing to commence while a compulsory counterclaim was being considered by the South Carolina Supreme Court, and (9) determining the judgment amount when the compulsory counterclaim was still on appeal. Additionally, Ostendorff argues he was denied due process and equal protection because he was not present at the hearing and not provided discovery. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 658, 667 S.E.2d 7, 14 (Ct. App. 2008) ("It is well settled that an issue must have been raised to and ruled upon by the [master-in-equity] to be preserved for appellate review."); Rule 60(b)(1), SCRCP ("[T]he court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ."); *Goodson v. Am. Bankers Ins. Co. of Fla.*, 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988) ("Although most often used when relief is sought from a judgment by default, Rule 60(b)(1) applies to any final judgment.").

AFFIRMED.[1]

SHORT and THOMAS, JJ., and CURETON, A.J., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

APPENDIX

1) Court of Appeals decision

2) Motion for Rehearing

3) Record on Appeal

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