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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SPARTANBURG COUNTY
Gordon G. Cooper, Master In Equity

Appellate Case No. 2016-001014

ATCF REO HOLDINGS LLC, Respondent,

v.

James K. Hazel, Jr., Prime Asset Fund III, LLC, John Doe and Mary Roe, representing all unknown persons having or claiming to have any right, title, or interest in or to, or lien upon, the real estate described as 517 Wildwood Drive, Spartanburg County, SC, their heirs and assigns, and all other persons, firms, or corporations entitled to claim under, by or through the above-named Defendant(s), and all other persons or entities unknown claiming any right, title, interest, estate in, or lien upon, the real estate described as 517 Wildwood Drive, Spartanburg County, SC, Defendants,

Of Whom James K. Hazel, Jr. is the Appellant.

REPLY BRIEF OF APPELANT

James K. Hazel, Jr.
201 Powell Mill Rd.
Apartment L205
Spartanburg SC 29301
Appellant Pro-Se

TABLE OF CONTENTS

TABLE OF AUTHORITES.....2

REPLY TO RESPONDENTS ISSUES ON APPEAL.....3

STATEMENT OF THE CASE.....3

ARGUMENTS

DID THE APPELLANT HAVE A RIGHT TO A JURY TRIAL AND WAS THE DEMAND TIMELY MADE?.....4

WAS THE CASE PROPERLY REFERRED TO THE MASTER?.....7

WAS IT AN ABUSE OF DISCRETION FOR MASTER IN EQUITY TO DENY APPELLANT THE RIGHT TO CROSS EXAMINE RESPONDENTS WITNESS?.....9

CONCLUSION.....10

TABLE OF AUTHORITIES

CASES

Wilder Corp. v. Wilke, *497 S.E.2d 731(1998)* .....4,5 & 7

Rosenbaum v. S-M-S 32, 427, S.E.2d 897 (1993) .....5 & 6

Beach Co. v. Twillman, Ltd., *566 S.E.2d 863 (2002)* .....6 & 7

North Greenville College v. Sherman Const. Co., Inc., 243 S.E.2nd 441 (1978 9

STATUTES

SC Code Ann. § 12-61-10 thru 60.....5 & 8

SC Code Ann. § 15-67-10 thru 100.....5 & 8

SC Code Ann. § 15-67-70 8

OTHER AUTHORITIES

SC Constitution, Article I, Section 3 & 14 4

SC Rules Civ. Proc., Rule 38(a) & (b), ...4 & 6

S.C. Rules Civ. Proc., Rule 53(b),.....6 & 8

REPLY TO RESPONDENTS ISSUES ON APPEAL

I. DID THE APPELLANT HAVE A RIGHT TO A JURY TRIAL AND WAS THE DEMAND TIMELY MADE?

II. WAS THE CASE PROPERLY REFERRED TO THE MASTER?

III. 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.

ARGUMENT

I. DID THE APPELLANT HAVE A RIGHT TO A JURY TRIAL AND WAS THE DEMAND TIMELY MADE?

A. Were Arguments Presented On Appeal Raised Before The Master?

The Respondent argues that the arguments raised on appeal in reference to the Master's denial of the Appellants Motion for Jury Trial were not raised before the Master. The demand for trial by jury was made by the Appellant on March 31, 2016. The demand was made in writing and the Appellant cited the ***South Carolina Constitution***, Article 1, Section 3 and 14, in addition to ***SC Rules Civ. Proc.***, Rule 38(a) and (b) as controlling law in the case. The respondent filed a response in opposition on April 6, 2016. The merits hearing occurred on April 12, 2016. The Respondent on appeal contends that the Appellant did not raise any legal argument; however, as indicated above and acknowledged by the Respondent, the Appellant's legal argument was the SC Constitution and SC Rules of Civil Procedure. On Appeal, the Appellant has cited additional authorities and statutes that support Appellants right to a Jury Trial based upon Article 1, Section 3 and 14 and SC Rules Civ. Proc., Rule 38(a) and (b). During the hearing, the Appellant requested the Master allow the presentation of "statutory information" to show the right to a jury trial. (Transcript, R., pg. 56, ln. 3-5) Even though Respondent had no objection; (Transcript, R., pg. 56, ln. 9) the Master ruled without allowing the Appellant to present the statutory evidence in opposition to ***Rosenbaum.*** The Respondent cites ***Wilder Corp. v. Wilke***, *497 S.E.2d 731(1998)* in reference to the preservation of the arguments raised herein; however, the Court in ***Wilder Corp.***, *497 S.E.2d. 731 at 733* held that, " In this case, Seller's and Buyer's amortization schedules clearly conflicted ." Just as in the current

case the Respondent's purchase of the property from MTAG and the Appellants assertion that the sale was in violation of the Statute showed a clear conflict. The demand for a Jury Trial founded upon the SC Constitution and SC Rules of Civ. Proc. also conflicted with the case presented by the Respondent. The Court further held in ***Wilder Corp.*** *at 734* that: " As discussed above, in the context of the case, Seller's objection was sufficiently specific to inform the trial judge of any error." The Appellant is appealing the Order of the Master In Equity. The argument of the Appellant was in the form of a written pleading. The Master did not listen to the additional authorities that the Appellant attempted to raise. Therefore this issue is properly before this Court.

B. Was Appellant Entitled To A Jury Trial in Action To Quiet Tax Title Of The Property Following A Tax Sale?

The Respondent asserts that the Appellant did not plead a counterclaim and as such the right to a jury trial would not attach, this being a matter of equity. The Respondent filed Summons and Complaint in this action on June 4, 2015 pursuant to ***SC Code Ann.*** § 12-61-10 through 60 and ***SC Code Ann.*** § 15-67-10 through 100. ***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."

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 and specifically guarantees the Appellant to right to a jury trial if so requested.

The Appellants Motion to Dismiss and Answer to the Complaint of the Respondent specifically notice that the sale was not valid according to statute and that the Appellant was owed monetary compensation for the invalid sale. The Respondent was not a party to the tax sale, purchasing the property from MTAG on April 26, 2015. Prior to the sale of the tax title, MTAG did not initiate any legal action to possess the Appellants home. This Court held in ***Beach Co. v. Twillman, Ltd.,*** *566 S.E.2d 863 (2002) at 867* that: "Twillman's right to a jury trial and its right to assert a compulsory counterclaim are separate and distinct rights." As such this appeal is properly before this Court and the issues are preserved for review.

C. Did Appellant Waive Right To Jury Trial By Failing To Make Timely Demand?

Respondent ends by asserting that the last pleading in the case was filed by on August 14, 2015 and that any jury demand had to be made no later than August 24, 2015 based upon their reading of ***SC Rules Civ. Proc.,*** *Rule 38(b).* [Respondents Brief, pg. 6, ln. 16-17] Nevertheless, they cite prior to this ***SC Rules Civ. Proc.***, *Rule 53(b) References*, which states that:

> " Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court"

The above cited rule clearly states that once a case is referred to the Master a demand for a Jury Trial is proper at that time and not just during the Complaint, Counterclaim and Answer phase of the proceedings. In ***Beach Co.,*** *at 865* this Court held that the "[R]ules of procedure, like statutes, should be given their plain meaning." At no time during the hearing did the Respondent raise the issue of the Appellants demand for jury trial being untimely filed. As noted, to be preserved for appellate review, an argument must have been raised to and ruled upon by the trial court. ***Wilder Corp.,*** *497 S.E.2d. 731 at 734.* The demand for jury trial was timely made and within the structure dictated by the Constitution and Statutes of South Carolina.

II. WAS THE CASE PROPERLY REFERRED TO THE MASTER?

A. Was The Case Properly Referred To The Master Pursuant To SC. Rules Civ. Proc., Rule 53?

The Respondent has attempted to define this litigation as one for foreclosure. The Respondent did not file the case as one for foreclosure but instead as an Action to Quite Tax Title and used the statutes referencing that in the Complaint. Respondent cannot now re-define the pleading to suit their version of the facts. Respondent states that the Appellant cannot now raise the issue of jurisdiction on appeal because it was not raised at the hearing. The S.C. Supreme Court has long held that: "It is elementary that lack of jurisdiction of the cause or subject matter can be raised at any time, including for the first time on appeal in this Court." ***State v. Funderburk****, 191 S.E.2d 520, 522 (1972)* (Exhibit XI, R., pg. 106, para. [5]) The Respondent made a Motion for Mandatory Order of Reference on January 5, 2016. The Order, prepared by the Respondent, was granted by an Assistant

acting for the Clerk of Court on February 12, 2015. (Order of Reference, R., pg. 6) The document signed by the Assistant Clerk clearly shows that the term "Presiding Judge" was marked through by the Assistant and signed by the Assistant for the Clerk of Court, Hon. M. Hope Blackley. Attached to the Order and filed in the record with the Clerk's Office is the email communication from the Respondent giving the Assistant instructions on how to proceed. (Order of Reference, R., pg. 7) There was no email communication with the Appellant and the Assistant did not send any notice of the Order to the Appellant. Appellant was unaware that any Order had been granted until receiving Notice of Hearing on filed on March 25, 2016 and received by Appellant on March 29, 2016. Appellant promptly filed Demand for Jury Trial on March 31, 2016. The Appellant had no notice of the Order and as such could not have appealed the Order of the Clerk. It was the Respondent who 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 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. It was the Respondent that directed the Assistant Clerk to refer the case to the Master. Since this action was referred by the Clerk of Court and/or an Assistant acting on behalf of the Clerk, 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?

Respondent contends that the Master was not given an opportunity to address the Appellants concerns and this issue is not properly before this Court. The appellant is and was proceeding pro se in this matter and may not have used the appropriate terminology; however, the Appellant did try to address the concerns. Appellant was unable to proffer anything because the Master interrupted his questioning of the witness and made a final judgment. 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.

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;

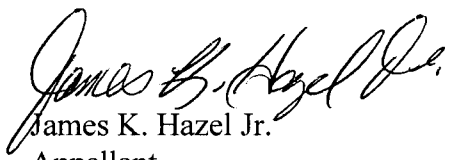
III. Tax Sale voided;

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.

31 October 2016

Respectfully Submitted



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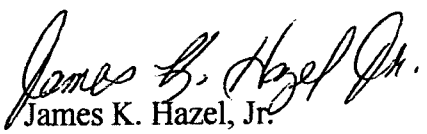
Of Whom James K. Hazel, Jr. is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief complies with SCACR, Rule 211(b).

31 October 2016



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